SUPREME COURT OF THE UNITED STATES.

No. [illegible]

O. T. DEURE AND WILLIAM PAGE, ASSIGNEES OF THE BOSTON LOCOMOTIVE WORKS, APPELLANTS,

vs.

THE MILWAUKEE AND [illegible] RAILROAD COMPANY, JAMES B. [illegible], AND SAMUEL B. SCOTT.

APPEAL [illegible]

SUPREME COURT OF THE UNITED STATES.

No. 234.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES OF THE BOSTON LOCOMOTIVE WORKS, APPELLANTS,

vs.

THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, JAMES B. CROSS, JAMES LUDINGTON, AND SAMUEL B. SCOTT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

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1 Circuit court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the sixth day) of July, A. D. 1863.

Present: The Honorable Andrew G. Miller, district judge, presiding; Darius C. Jackson, marshal; John M. Miller, clerk.

Among other the following proceedings were had, to wit:

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES OF THE Boston Locomotive Works, complainants,
vs.
MILWAUKEE AND SUPERIOR RAILROAD COMPANY, THE city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, defendants.
} In equity.

Be it remembered, that heretofore, to wit, on the fourteenth day of January, A. D. 1861, in the district court of the United States for the district of Wisconsin, came the said complainants by their solicitors, Messrs. Prichard and Jackson, and filed their bill of complaint against said defendants, as follows:

Bill of complaint.

To the judge of the district court of the United States of America for the district of Wisconsin, in equity:

G. P. Drury and William Page, who are residents and citizens of the State of Massachusetts, and assignees of the Boston Locomotive Works, which is a corporation duly created and organized under and by virtue of the laws of the State of Massachusetts, and having its domicil and place of business in Boston, in the State of Massachusetts, bring this their bill for them-

2 selves against the Milwaukee and Superior Railroad Company and the city of Milwaukee, which are corporations created and organized by and under the laws of the State of Wisconsin, and having their domicil and location in the State of Wisconsin, also James B. Cross, James Ludington, and Samuel B. Scott, of the city of Milwaukee, and citizens of the State of Wisconsin; and thereupon your orators complain and say that heretofore, to wit, on the second day of October, and in the year of our Lord one thousand eight hundred and sixty, in the district court of the United States for the district of Wisconsin, by the consideration, and judgment of said court, the Boston Locomotive Works recovered against the said Milwaukee and Superior Railroad Company the sum of twenty-one thousand six hundred and thirty-four dollars and forty-five cents, for the damages which it had sustained as well by occasion of the non-performance of certain promises and undertakings, and also twenty-one dollars and twelve cents, as for the costs and charge by it about its suits in that behalf expended, which were adjudged to it in and by said court, whereof the said Milwaukee and Superior Railroad Company was convicted, as by the record of the said judgment, in the office of the clerk of said court, reference being thereunto had, and to which for greater certainty your orators pray leave to refer, will more fully and at large appear.

And your orators further show unto your honor that the said judg-

3 ments so recovered in manner aforesaid, remaining in full force and

effect, and the damages and costs aforesaid remaining unpaid and unsatisfied, your orators, on or about the first day of December, in the year of our Lord one thousand eight hundred and sixty, for the purpose of obtaining satisfaction of the said judgment, sued and prosecuted out of the said court, a writ called a fieri facias, directed to the marshal of the United States for the district of Wisconsin, by which said writ the said marshal was commanded that of the goods and chattels of the said defendant, the Milwaukee and Superior Railroad Company, in his district, he cause to be made the said sum of twenty-one thousand six hundred and thirty-four dollars and fifty-five cents and costs, and if sufficient goods and chattels cannot be found, then the said marshal was commanded to cause the amount of such judgment as aforesaid to be made of the lands and tenements of said defendant, which it shall have had at the time of the docketing of such judgment, and that he should have that money before the judge of the said district court, at the city of Milwaukee, in the district of Wisconsin, on the first Monday of December, in the year of our Lord one thousand eight hundred and sixty, to satisfy the judgment so recovered as aforesaid, and that he should have then there that writ.

And your orators further show unto your honor that the said writ of fieri facias before the delivery thereof to the said marshal was duly endorsed, with a direction to collect the damages and costs aforesaid with interest and his fees, and was afterwards, and on or about the first day of December, in the said year of our Lord one thousand eight hundred and sixty, de-
4 livered to the said marshal to be executed in due form of law.

And your orators further show unto your honor that the said marshal on the first Monday of December, in the year of our Lord one thousand eight hundred and sixty, returned on the said writ to him in that behalf, directed and delivered as aforesaid, no property found whereon to levy and satisfy this writ or any part thereof as by the said writ of fieri facias, and the directions and the return of the said marshal endorsed thereon as aforesaid, filed in the office of the clerk of the said court on the day and year last mentioned, will more fully appear, and to which or a copy thereof your orator pray leave to refer.

And your orators further show unto your honor that, as they have been informed and believe to be true, the said judgment still remains in full force and effect, not reversed or satisfied or otherwise vacated, and the said the Milwaukee and Superior Railroad Company has not paid the sum, but has hitherto wholly neglected and refused to do so.

Your orators further show that prior to the commencement of said suit in which said judgment was rendered as aforesaid, the said Boston Locomotive Works had duly assigned and delivered to your orators the notes of said railroad company upon which said judgment was recovered; that said action was commenced and prosecuted in the name of the Boston Locomotive Works, plaintiff, but for the benefit and advantage of your orators, and that your orators are now the legal holders and owners of said judgment.

And your orators further show unto your honor that there is now actually and equitably due to your orators upon the aforesaid judgment, the sum of twenty-one thousand six hundred and fifty-five dollars and fifty-seven
5 cents, together with interest thereon from the second day of October, one thousand eight hundred and sixty, over and above all just claims of the said railroad company by way of offset or otherwise.

And your orators further show unto your honor that they have reason to believe and do believe that the said the Milwaukee and Superior Railroad Company has equitable interests, things in action, or other property of the value of upwards of five hundred dollars exclusive of all prior just claims thereon, which your orators have not been able to discover and reach by execution on the said judgment.

And your orators further show unto your honor that as they have been informed and believe to be true, the said railroad company has a considerable amount of notes, due bills, bonds, mortgages, judgments, contracts, accounts, money, and of legal and equitable debts, claims and demands due to it from different persons, (whose names are unknown to your orators,) and that it has goods, chattels, lands, tenements, leasehold interests, equitable interests in real estate, contracts in relation to real estate, money and other personal property, either in possession or held in trust for it, the situation, value, and particulars of which are unknown to your orators, and your orators are fearful the said railroad will make way with or place the same beyond the control of this court or a court of law, unless restrained from so doing by an injunction from this court.

And your orators further show unto your honor upon information and belief that the defendant, the city of Milwaukee, has in its possession or under its control a large amount of notes and mortgages given to secure the same, being of various dates and amounts, and executed by divers
6 different persons to the said railroad company, being such notes and mortgages as are commonly known and denominated as railroad farm mortgage, and amounting in the aggregate at their par value to fifty thousand dollars, which notes and mortgages in fact belong to and are the property of the said Milwaukee and Superior Railroad Company, and ought to be used and applied in the payment of the honest and bona fide debts of said Milwaukee and Superior Railroad Company; that said city of Milwaukee, as your orators are informed and believe, claims and pretends that said farm mortgages and notes were assigned and transferred by said railroad company to said city, and are now held by said city in some way as a security and indemnity of the said city against loss by reason or in consequence of a pretended issue and loan by said city of its corporate bonds to said railroad company to the aggregate amount of one hundred thousand dollars, to aid in the construction of the railroad of said company. But your orators are advised and believe, and therefore aver, that if the said city of Milwaukee ever issued and delivered its corporate bonds to said railroad company as a loan or otherwise for any purpose whatever, it was done without any authority whatever therefor, and the bonds so issued are wholly void, and of no binding force or effect upon said city, and said city has not suffered and cannot suffer or sustain any legal loss or damage by reason or in consequence thereof. Wherefore your orators claim and insist that said notes and mortgages, if the same have ever been transferred to said city of Milwaukee, have been so transferred without any legal, valid, or valuable consideration therefor, moving from said city to said railroad company; that such transfer was gratuitous, and at least void as against all the creditors
7 of said railroad company, and said city has not thereby acquired any title or claim whatever to said notes and mortgages or any of them, but the same are and remain the absolute property of said railroad company, and are liable to the payment of its valid debts.

And your orators further show unto your honor that said Milwaukee and Superior Railroad Company was duly incorporated and organized by and under an act of the legislature of the State of Wisconsin, entitled "An act to incorporate the Milwaukee and Superior Railroad Company," approved March 4th, 1856, for the purpose of constructing a railroad from the city of Milwaukee by the most eligible and feasible line through the towns of Cedarsburg and Grafton, and a point not more than one mile from the village of Port Washington, and through the city of Sheboygan and the village of Manitowoc, to some suitable point on the Fox River, at the city of Green Bay, and thence on the most eligible line to the town of Superior, at the head of Lake Superior.

That said company thereupon entered upon the work of constructing such railroad; that on or about the first day of January, A. D. 1857, the said railroad company, for the purpose of raising money by loan for the purchasing and transporting iron rails and machinery therefor, and for aiding in the construction of said railroad, resolved to execute its corporate bonds, with interest coupons annexed, to an amount not exceeding five hundred and fifty thousand dollars during the year 1857, and to a further amount not exceeding six hundred and fifty thousand dollars during the year 1858, and not exceeding in the aggregate amount twelve hundred thousand dollars;

said bonds to be issued in amounts of one thousand dollars each,

8 payable in the city of New York, on the first day of January, A. D. 1877, and to bear interest at eight per cent. per annum, payable simultaneously in the city of New York. That for the purpose of securing the payment of such bonds so to be issued, said railroad company on or about the first day of January, 1857, duly executed, acknowledged, and delivered to the Farmers' Loan and Trust Company, of the city of New York, as trustee, a mortgage or trust deed of all the following real and personal property and estate of the said Milwaukee and Superior Railroad Company; that is to say, all the first division of its said railroad from the said city of Milwaukee to the said city of Green Bay, both in the State of Wisconsin aforesaid, a distance of one hundred and twenty miles, including the right of way and land occupied by said first division of said road, together with the superstructure and tracks thereon, and all rails and other materials used thereon, bridges, viaducts, culverts, fences, equipments, necessary depot grounds and buildings thereon belonging to the said Milwaukee and Superior Railroad Company, and all rolling stock, engines, tenders, cars, tools, materials, machinery, fixtures, and all other personal property appertaining to said first division of said road, and then belonging to said railroad company or thereafter to be acquired by them, and all rights thereto and interest therein, and also future rights thereto and interest therein to be acquired by said railroad company, together with the name and franchises appertaining to the said first division of said road, all tolls, rents, and income to be had or derived therefrom, and all corporate and other franchises, rights, and privileges of the said railroad company, in and to or concerning the same.

9 That said railroad company thereupon executed five hundred and fifty of said bonds secured by said mortgages, which was the first lien and incumbrance upon the property therein described. That on or about the fourth day of December, 1856, the said railroad company contracted with Bailey Brothers & Co., Liverpool, England, by C. B. Raymond & Co. of New York, then agents for the purchase of them of four thousand tons of iron rails for the track of said company's railroad, to be delivered during the spring and summer of the year 1857, for the purchase price of which the said railroad company agreed to give its notes payable in the city of New York to the order of its treasurer, and by him endorsed at six, nine, and twelve months, equal amounts, with interest at seven per cent. per annum added from the time of delivery in New York; and said railroad company further agreed that said notes for said railroad iron should be endorsed by C. R. Alton, H. Hautel, Edward Button, D. P. Hull, or others, in responsibility satisfactory to said C. B. Raymond & Co., and that with said notes so endorsed should be lodged first mortgage eight per cent. bonds of said railroad company (of the kind before described) with said C. B. Raymond & Company at fifty per cent.; that is, for every dollar in notes, two dollars in bonds.

Your orators further aver, upon information and belief, that the business and affairs of said railroad company were by terms of its said charter and of its by-laws placed under the control and management of a board of

directors, consisting of seven persons, and that a majority of four of the members of said board constituted a quorum of the board, and was competent and authorized to transact business as such; that said Alton,
10 Hautel, Button, and Hull were each and every one of them members of said board of directors at the time the said contract with Bailey Bros. & Co., and, except said Alton, continued so to be such member of said board from that time until after the sale of said railroad and said property of said company under a pretended foreclosure of said mortgage, as hereinafter set forth; that they and each of them assented to the terms and conditions of said contract; that under said contract said railroad company during the spring and summer of 1857 received said railroad iron rails from said Bailey Bros. & Co. to the amount and value of between sixty and seventy thousand dollars, for which sum said railroad company gave its notes in various amounts, payable some in six, some in nine, and some in twelve months from date; all of which notes were endorsed by said Alton, Hull, Button, and Hautel, directors in said company as aforesaid, and were delivered to said Raymond & Company as agents as aforesaid, and that as additional security for the payment of said notes, said railroad company lodged therewith in the hands of C. B. Raymond & Co. an amount of said first mortgage bonds equal at their par value to double the amount of said notes.

Your orators further show upon information and belief that in or about the month of October, A. D. 1857, said railroad company was compelled, for want of funds and by its inability in consequence of the then general panic and prostration of financial confidence and credit throughout the country to procure means to prosecute the construction of its said road, to suspend such construction; that being unable to meet and pay said notes so given for railroad iron as they matured, said railroad company, with the
11 assent of said Alton, Hautel, Button, and Hull, returned to said C. B. Raymond & Co. all of said iron rails which had not yet been laid down upon said railroad, and in consideration thereof said C. B. Raymond & Co. delivered up to said railroad company, to be cancelled, its notes so given for the rails so returned, and likewise surrendered and delivered up to said railroad company a proportional amount of said first mortgage bonds, held by them as collateral to said notes as aforesaid, and further renewed and extended the payment of the remaining notes for six months from the date of their maturity, respectively, upon the same security, to wit, the endorsement of said Hull, Button, Alton, and Hautel, and the pledge of first mortgaged bonds in the proportion of two dollars of bonds to one dollar of notes.

Your orators further show, upon information and belief, that at the time of such surrender and extension said railroad company was wholly insolvent to the knowledge of said Alton, Hull, Button, and Hautel, and that it has never since that time resumed the construction of its said railroad, nor the payment of its liabilities; that no more first mortgage bonds were ever executed by said railroad company but the five hundred and fifty before mentioned; that about the time the first of the extended notes of said railroad company in the hands of said C. B. Raymond & Co. became due, to wit, about the month of April, 1858, said five hundred and fifty bonds were held and disposed of as follows: forty-two of said bonds amounting to forty-two thousand dollars, were held by C. B. Raymond & Co. as collateral to the endorsed notes of said railroad company, amounting in the aggregate to twenty thousand seven hundred and twenty-three dollars, one hundred and twenty-eight of said bonds were de-
12 posited with the city of Milwaukee as security and indemnity of said city against loss by reason of the alleged issue and loan of its corporate bonds to the amount of one hundred thousand dollars to said railroad company; one hundred of said bonds had been duly cancelled and annulled

by a resolution of the board of directors of said railroad company, and the remaining two hundred and eighty of said bonds, being numbered 271 to 550, inclusive, had been placed in the hands of M. K. Jessup & Co., of the city of New York, in September or October, 1857, pursuant to a resolution of the board of directors of said railroad company, whereby said railroad company declared and determined that "no more than two hundred and seventy thousand dollars of the said bonds, including bonds from number one to two hundred and seventy, inclusive, should be issued, used, or hypothecated by said company until after the payment to said C. B. Raymond & Co. of the then existing indebtedness of said railroad company held by said C. B. Raymond & Co., nor until said railroad should be completed to a point at least twenty-seven miles from the city of Milwaukee, in the direction of and towards the city of Sheboygan, and that until then the said two hundred and eighty bonds, numbered from two hundred and seventy-one to five hundred and fifty, inclusive, should be placed in the hands of M. K. Jessup & Co., sealed up with the joint seals of the president of said railroad company, and of said M. K. Jessup & Co., to be held by said M. K. Jessup & Co., in trust, not to be delivered up by them to the officers or agents of said railroad company until the trust for which they were placed in their hands should be fully performed and accomplished.

13 Your orators further show, upon information and belief, that the said bonds of the city of Milwaukee so loaned and issued to said railroad company were illegal, unauthorized, and void, and were and are not binding on said city, and that by reason thereof the pledge and transfer of said one hundred and twenty-eight of said first mortgage bonds to said city of Milwaukee was without consideration and void, and conferred upon said city no title to, or valuable interest in, said bonds, or in said mortgage upon the property and franchises of said railroad company, and that the only first mortgaged bonds of said railroad company realy issued and disposed of by said company, in pledge or otherwise, so as to constitute the same in the hands of their holders a valid and subsisting lien and charge upon said mortgaged property and franchises on the first day of May, A. D. 1858, and from that time until about the month of May, 1859, were said forty-two bonds held by said C. B. Raymond & Co. in the manner and for the purposes aforesaid.

Your orators further show that on or about the 16th day of December, 1856, the said railroad company agreed with the said Boston Locomotive Works for the purchase of several locomotive engines and tenders on a credit of nine months for one half and twelve months for the other half of the purchase price thereof from the date of the delivery; that pursuant to such agreement the said Boston Locomotive Works furnished and delivered to said railroad company one locomotive and tender in the month of July and another in the month of September, 1857, at the agreed price for both of them of eighteen thou-

14 sand dollars, for which, with interest added, the said railroad company gave its notes pursuant to said agreement, bearing date in July and September, respectively, and payable to the order of its president, C. R. Alton, and by him endorsed and delivered to said Boston Locomotive Works; that no part of said notes, or either of them, or the interest thereon, has ever been paid; and that said notes are the same indebtedness of said railroad company upon and for which the judgment hereinbefore mentioned was recovered.

Your orators further show, upon information and belief, that during the years 1856 and 1857, and before the suspension as aforesaid, said railroad company had constructed and completed about five miles of its road, on which it had laid about five hundred tons of iron rails, and had placed the said two locomotive engines and tender and also ten platform cars, purchased by said company at a cost of about six thousand dollars.

Your orators further show upon information and belief that when said notes, given by said railroad company for said railroad iron, became due they were not paid, and the said endorses thereupon became liable thereon; that James Boorman Johnston & Co., of the city of New York, had to become the agents of said Bailey Bros. & Co., and as such held said notes and the bonds pledged as collateral thereto; that about the month of May, 1858, they commenced suits upon said notes then matured against said endorsers in the district court of the United States for the district of Wisconsin; that while said suits were pending said endorsers applied to James Boorman Johnston & Co. and requested them to cause said
15 mortgage or trust deed to be foreclosed, which said Johnston & Co. refused to do. That said endorsers and directors then arranged with said Farmers' Loan and Trust Company, the trustee named in the said mortgage, with the consent of said Johnston & Co., that a suit for such foreclosure should be prosecuted at the risk, and, in case of failure, at the expense of such endorsers, who were still directors of said company; that said suit should be prosecuted nominally by the attorneys of said Johnston & Co. as the solicitors of said trustees, while the labor and legal services in and about said foreclosure should be chiefly performed by the attorney of said railroad company under the direction of the said directors and endorsers. That in accordance with such arrangement, a bill was filed on or about the 13th day of December, 1858, for the foreclosure of said mortgage in this court, in the name of said trust company as complainant, purporting to be for the benefit of the holders of the bonds of said company secured by said mortgage, but in truth and in fact at the sole instance and request, and at the risk and for the benefit of the said directors of said railroad company, and that said foreclosure was prosecuted nominally by the attorneys of said Johnston & Co. as solicitors of said trust company, but with the actual assistance and co-operation of the attorney and other officers of said railroad company. That the subpœna in said suit for the foreclosure of said mortgage or trust deed was served only on the secretary of said railroad company, who was at the same time the attorney of said railroad company, and, as such attorney of said railroad company, was assisting in prosecuting said foreclosure suit as aforesaid; that no defence was interposed in said foreclosure suit, and no action was taken by said board of directors to defeat the same, or to advise
16 the shareholders or creditors of said railroad company that such suit was pending, but that every effort was made by said endorsers and directors to faciliate and render the same effectual to secure the full and complete discharge of the personal liabilities of said endorsers and directors, without regard to the rights or interests of your orator, or any of the other bona fide creditors of said company. That the better to secure and accomplish that object, the directors after the said foreclosure suit was commenced, and while said company was notoriously insolvent, fraudulently and corruptly conspired together to remove the said two hundred and eighty thousand dollars of said first mortgage bonds then still in the hands of M. K. Jessup & Co. for the purposes and upon the trusts hereinbefore set forth, out of the hands of said M. K. Jessup & Co. and to pledge the same with said Johnston & Co., as further security for the notes in their hands against the said railroad company and the said directors and endorsers as aforesaid, thus furnishing said Johnston & Co. with security by first mortgage bonds to the amount of three hundred and twenty-two thousand dollars for their demand of about twenty-two thousand dollars in the place of forty-two thousand dollars in bonds, to which they were entitled by the original contract with Bailey Bros. & Co., as aforesaid. That in pursuance with said fraudulent and corrupt determination and conspiracy, the said board of directors, under the direction and by the procurement of said Hautel, Button, and Hull, on or about the third

day of March, A. D. 1857, of their own accord, and without any request or consideration from said Johnston & Co., them thereunto moving, and, as your orator is informed and believes, without the knowledge of, passed a resolution directing that said bonds so deposited with said M. K. Jessup & Co. should be transferred and delivered up by them to said James B. & Co., agents of said Bailey Bros. & Co., as additional collateral se-
17 security for the payment of the said indebtedness of said railroad company to them, provided said Johnston & Co. would give their assent thereto, and that said first mortgage bonds were accordingly delivered by said Jessup & Co. to said Johnston & Co., and accepted by them, as your orator is informed and believes, on or about the first day of May, A. D. 1859. That said transfer was made, and that said additional pledge of said two hundred and eighty bonds was made voluntarily and gratuitously by said railroad company, that no consideration therefor was ever paid by said Johnston & Co., or their above-named principals, to said railroad company, and that said railroad company never had or received any advantage or benefit therefrom whatever. That from the commencement of said foreclosure suit, efforts were made by said Hautel and others, endorsers and directors as aforesaid, to find some one who would purchase the said claims of said Johnston & Co., with said bonds as collateral thereto, and release the said endorsers from all liability thereon; that one of the purposes of the said endorsers and directors in so fraudulently issuing and delivering said two hundred and eighty bonds to said Johnston & Co., as further security for the payment of said notes, was to induce the making of such arrangements as aforesaid. That the said endorsers and directors, as your orators are informed and believes, then believed that there was at that time outstanding, and for which said railroad company were liable, more than said forty-two bonds then held by said Johnston & Co. That said endorsers and directors well knew that said foreclosure suit was then pending, that the property and franchises of said railroad company was insufficient to pay the whole amount of said bonds which they supposed were then outstanding, when sold on the decree
18 which would be rendered in said foreclosure suit, that in case of a division among all of the supposed bondholders of the money arising from the sale of the property and franchises of said railroad company, on the decree in said foreclosure suit, the said Johnston & Co. would not receive in virtue, of said forty-two bonds, a sum sufficient to pay and discharge said notes and release said endorsers, and that it was also the purpose of said endorsers and directors to place in the hands of said Johnston & Co. the said two hundred and eighty bonds, so that the said Johnston & Co. would, upon the division of the money arising from the sale of the property and franchises of said railroad company, receive, in virtue of said three hundred and twenty-two bonds, a sufficient sum to pay said notes, and in that way discharge said endorsers from their liability on said notes as endorsers, and that said two hundred and eighty bonds were fraudulently delivered to the said Johnston & Co. with the fraudulent intent, and for the purposes above-mentioned, and no other whatever.

Your orators further show, upon information and belief, that about the month of March, 1859, and before said two hundred and eighty bonds were delivered by said Jessup & Co. to said Johnston & Co., negotiations were entered into between said endorsers and directors on the one hand, and the defendants, James B. Cross, James Luddington, and Samuel B. Scott, on the other, for the purchase of said claims by said Cross, Luddington, and Scott, upon the fraudulent and corrupt arrangement, and understanding which was then and there made, and entered into between them, that the said endorsers should secure to said Cross, Luddington, and Scott the absolute ownership of said mortgaged premises, freed and discharged of

19 all liens and claims, and as a certain means of accomplishing that end should perfect the title of Cross, Luddington, and Scott to all of said first mortgage bonds, ammounting at their face to three hundred and twenty-two thousand dollars, besides interest, so that they should become the absolute owners thereof; and that in consideration thereof, they, the said Cross, Luddington, and Scott, should purchase said indebtedness from said Johnston & Co., and release and discharge said endorsers from all liability thereon. That such corrupt and fraudulent arrangement was perfected, as your orators are informed and believe, in the latter part of April, 1859, with the full knowledge on the part of said Cross, Luddington, and Scott of the trust upon which said Jessup & Co. held said two hundred and eighty bonds, and of the circumstances, purposes, and objects of the transfer thereof, by the procurement of the said endorsers to said Johnston & Co., and that said Cross, Luddington, and Scott, with the knowledge aforesaid, and in pursuance with such fraudulent arrangement or agreement, about the first day May, A. D. 1859, purchased and received an assignment from said Johnston & Co. of all their said claims against the said railroad company and said endorsers, being then wholly in judgment and amounting in all to less than twenty-three thousand dollars, together with said three hundred and twenty-two bonds as collateral thereto, and paid therefor the sum of about fourteen thousand dollars. That thereupon, and about the seventeenth day of May, 1859, for the purpose of carrying out said corrupt and fraudulent agreement made as aforesaid, with said endorsers, the said Cross who held the assignment of said claims and collaterals in his own name, but in

20 reality and in fact for the benefit of himself and the said Luddington and Scott, presented to the board of directors of said railroad company a written proposition to purchase said three hundred and twenty-two bonds, and offering as a consideration of such purchase to discharge all of such claims upon said notes then being in judgment against the said railroad company and said endorsers; that in response to said proposition, said board of directors, by procurement of said endorsers, on the same seventeenth day of May, passed resolutions authorizing the sale of said bonds at auction on not less than five days' notice, on condition that said Cross, Luddington, and Scott should bid thereon sufficient to satisfy said indebtedness; that this was done, well knowing that said bonds had no market value, especially with so large an amount outstanding and pledge for so small a sum, and with the confident and avowed belief that such a sale at auction would equally well secure their object, and better conceal the real fraudulent and corrupt purpose and design of the parties to such sale.

Your orators further show, upon information and belief, that on the seventeenth day of May, 1859, a notice appeared in one of the newspapers published in the city of Milwaukee, printed in small type and in an obscure part of said paper, without date or signature, and in the following words and figures, to wit:

"*Notice.*

"Three hundred and twenty-two thousand dollars of the first mortgage bonds of the Milwaukee and Superior Railroad Co. will be sold at auction on Saturday, the 28th of May inst., at 12½ o'clock p. m., at the Chamber of Comerce."

21 That without any other or different notice, as your orators are informed and believe, said bonds were offered for sale, and a pretended sale thereof made on said twenty-eighth day of May, 1859, to said James B. Cross, for the nominal sum of seventy dollars for each bond, or twenty-two thousand five hundred and forty dollars in all, being about the amount due

upon said claims against said endorsers and said railroad company, and that said Cross was the only bidder at such sale, and bid off said bonds for the price above mentioned for himself and the said Luddington and Scott, who were jointly interested with him in said claims.

Your orators further aver, upon information and belief, as a part of the arrangement between said endorsers and directors and said Cross, Luddington & Scott, such of said notes before held by said Johnston & Co. as were not yet in judgment, had, on or about the twenty-sixth day of April, 1859, been put in judgment against said railroad company and said endorsers, with their consent, and when necessary on their confession; and that after said pretended auction sale of said bonds said Cross, Luddington & Scott, pursuant to their aforesaid corrupt and fraudulent agreement, caused the said several judgments against said endorsers and directors and railroad company to be satisfied and discharged of record, and have from thence hitherto claimed and do now claim that, through and by means of said pretended and fraudulent sale of said bonds, authorized and made by and in pursuance of said corrupt, dishonest, and fraudulent agreement and collusion between them and said directors of said railroad company, they, the said Cross, Luddington & Scott became and now are the lawful and absolute bona fide owners and holders of said three hundred and twenty-two bonds, acquired as aforesaid, and that all of said bonds, together with
22 the interest coupons thereto attached, and already past due, to the amount of fifty thousand dollars and upwards, and many of which had fallen due while said bonds were still in the hands of M. K. Jessup & Co., were and constitute in the hands of them, the said Cross, Luddington & Scott, a valid subsiting indebtedness of said railroad company to them to the amount in all of nearly four hundred thousand dollars; that the whole thereof was secured by said first mortgage or trust deed, and that out of the proceeds of said mortgaged premises, on a sale thereof under a decree in said foreclosure suit they were entitled to be first fully paid said full sum of four hundred thousand dollars, or thereabouts, before any part thereof could be applied to the payment of any of the other creditors of said railroad company.

Your orators further show that the road and franchises and property of said railroad company were, by a decree of this court, made on the 19th day of March, 1859, ordered to be sold, and were, in pursuance thereof, sold by the marshal of said district on the 27th day of August, 1859; that said Cross, Luddington & Scott, being the holders of an amount of the bonds of at least four times the entire value of said road, and franchises, and property of said railroad company, and being the holders of all the valid bonds outstanding, were the only real bidders at such sale, and they, or one of them in behalf of themselves, readily became the purchasers at any price they might choose to offer therefor, and accordingly did purchase the same at the nominal price of twenty thousand one hundred dollars, the whole of which sum, after deducting therefrom the costs and expenses of said foreclosure and sale, and the charges of said trust company, complainant,
23 for services rendered to said railroad company, amounting to about fifteen hundred dollars, was returned to said Luddington, Cross & Scott as the sole and only first mortgage bondholders of said railroad company.

Your orators further show, upon information and belief, that your orators and the said Boston Locomotive Works had no knowledge or information of the existence of said foreclosure suit nor of any of the facts concerning the transfer of said two hundred and eighty bonds and the fraudulent conduct and proceedings in reference to said bonds and to the railroad franchises, and property of said railroad company, as is herein set forth, until long after said

sale, nor until long after said Cross, Luddington & Scott had taken possession of said road and property of said railroad company, claiming to be the purchasers thereof as aforesaid; and that, being informed of said facts, your orators at once entered upon an investigation of the matter and commenced proceedings to recover a judgment on said notes against the said company for the purpose of setting aside said fraudulent proceedings and sale.

Your orator further charges, information and belief, that at the time said decree of foreclosure was made and entered in this court, to wit, on the 19th day of March, A. D. 1859, and for several weeks thereafter, said James B. Johnston & Co. held said forty-two bonds first deposited with them as collateral for the payment of said notes held by them against said railroad company and said endorsers and directors, and no more; that said two hundred and eighty bonds placed by said railroad company in the hands of said M. K. Jessup & Co. in trust, as aforesaid, still remained in their hands, and that
24 said Johnson & Co. had not yet consented to the removal thereof or accepted the same as further security to said notes.

That said decree of foreclosure and sale was made for the benefit of the holders of the then outstanding bonds of said railroad company secured by said mortgage, and for the purpose of ascertaining who were such holders and what bonds were in fact outstanding, it was, among other things, ordered "that it be referred to a master of this court to take an account of the outstanding bonds of said railroad company, defendant, secured by said trust deed or mortgage, and which are (on the said 19th day of March, 1859) a lien on said mortgaged premises, and of the members and holders of such bonds, of the amount due thereon, for interest or principal, of the number and amount of said bonds which are (were) pledged or held as collateral security for debts or obligations of said railroad company, and the amount of principal and interest due upon the debt or obligations for which said bonds are (were) so pledged or held as security;" that before said master said three hundred and twenty-two bonds were presented as the absolute property of said James B. Cross, and said railroad company, controlled and directed by said endorsers and directors, in pursuanee with their said fraudulent and corrupt agreement, suffered and permitted all of said three hundred and twenty-two bonds to be allowed without objection on their part, as though the same in fact had been issued and were outstanding at the time said decree was made as aforesaid, whereas in truth and in fact, as your orator is informed and believes, two hundred and eighty of said bonds had never been issued or disposed of by said railroad company, but that said company was expressly prohibited from making such issue and disposition of
25 said bonds by its contract under which they were deposited with said M. K. Jessup & Co. in 1857, as hereinbefore set forth; and your orator is informed, advised, and believes, and therefore charges, that the removal of the said two hundred and eighty bonds from the custody of said M. K. Jessup & Co., and the attempted pledge thereof as additional security to the liabilities of said railroad company and of its directors to said Johnston & Co., after the making and entry of said decree of foreclosure, and the subsequent sale of said bonds at auction, and the presentation thereof, as the absolute property of said Cross, before the said master, and all the acts of said Cross, Luddington & Scott, and of said railroad company, and of its directors, in reference thereto, were a gross fraud upon this court, as well as upon your orators and the other bona fide creditors of said railroad company, and that said Cross, Luddington & Scott acquired thereby no title to said bonds or to said road or the property and franchises of said railroad company, but that all of their proceedings in the premises were wholly fraudulent and void as against your orators and all the creditors of said railroad company.

upon said claims against said endorsers and said railroad company, and that said Cross was the only bidder at such sale, and bid off said bonds for the price above mentioned for himself and the said Luddington and Scott, who were jointly interested with him in said claims.

Your orators further aver, upon information and belief, as a part of the arrangement between said endorsers and directors and said Cross, Luddington & Scott, such of said notes before held by said Johnston & Co as were not yet in judgment, had, on or about the twenty-sixth day of April, 1859, been put in judgment against said railroad company and said endorsers, with their consent, and when necessary on their confession; and that after said pretended auction sale of said bonds said Cross, Luddington & Scott, pursuant to their aforesaid corrupt and fraudulent agreement, caused the said several judgments against said endorsers and directors and railroad company to be satisfied and discharged of record, and have from thence hitherto claimed and do now claim that, through and by means of said pretended and fraudulent sale of said bonds, authorized and made by and in pursuance of said corrupt, dishonest, and fraudulent agreement and collusion between them and said directors of said railroad company, they, the said Cross, Luddington & Scott became and now are the lawful and absolute bona fide owners and holders of said three hundred and twenty-two bonds, acquired as aforesaid, and that all of said bonds, together with
22 the interest coupons thereto attached, and already past due, to the amount of fifty thousand dollars and upwards, and many of which had fallen due while said bonds were still in the hands of M. K. Jessup & Co., were and constitute in the hands of them, the said Cross, Luddington & Scott, a valid subsiting indebtedness of said railroad company to them to the amount in all of nearly four hundred thousand dollars; that the whole thereof was secured by said first mortgage or trust deed, and that out of the proceeds of said mortgaged premises, on a sale thereof under a decree in said foreclosure suit they were entitled to be first fully paid said full sum of four hundred thousand dollars, or thereabouts, before any part thereof could be applied to the payment of any of the other creditors of said railroad company.

Your orators further show that the road and franchises and property of said railroad company were, by a decree of this court, made on the 19th day of March, 1859, ordered to be sold, and were, in pursuance thereof, sold by the marshal of said district on the 27th day of August, 1859; that said Cross, Luddington & Scott, being the holders of an amount of the bonds of at least four times the entire value of said road, and franchises, and property of said railroad company, and being the holders of all the valid bonds outstanding, were the only real bidders at such sale, and they, or one of them in behalf of themselves, readily became the purchasers at any price they might choose to offer therefor, and accordingly did purchase the same at the nominal price of twenty thousand one hundred dollars, the whole of which sum, after deducting therefrom the costs and expenses of said foreclosure and sale, and the charges of said trust company, complainant,
23 for services rendered to said railroad company, amounting to about fifteen hundred dollars, was returned to said Luddington, Cross & Scott as the sole and only first mortgage bondholders of said railroad company.

Your orators further show, upon information and belief, that your orators and the said Boston Locomotive Works had no knowledge or information of the existence of said foreclosure suit nor of any of the facts concerning the transfer of said two hundred and eighty bonds and the fraudulent conduct and proceedings in reference to said bonds and to the railroad franchises, and property of said railroad company, as is herein set forth, until long after said

sale, nor until long after said Cross, Luddington & Scott had taken possession of said road and property of said railroad company, claiming to be the purchasers thereof as aforesaid; and that, being informed of said facts, your orators at once entered upon an investigation of the matter and commenced proceedings to recover a judgment on said notes against the said company for the purpose of setting aside said fraudulent proceedings and sale.

Your orator further charges, information and belief, that at the time said decree of foreclosure was made and entered in this court, to wit, on the 19th day of March, A. D. 1859, and for several weeks thereafter, said James B. Johnston & Co. held said forty-two bonds first deposited with them as collateral for the payment of said notes held by them against said railroad company and said endorsers and directors, and no more; that said two hundred and eighty bonds placed by said railroad company in the hands of said M. K. Jessup & Co. in trust, as aforesaid, still remained in their hands, and that
24 said Johnson & Co. had not yet consented to the removal thereof or accepted the same as further security to said notes.

That said decree of foreclosure and sale was made for the benefit of the holders of the then outstanding bonds of said railroad company secured by said mortgage, and for the purpose of ascertaining who were such holders and what bonds were in fact outstanding, it was, among other things, ordered "that it be referred to a master of this court to take an account of the outstanding bonds of said railroad company, defendant, secured by said trust deed or mortgage, and which are (on the said 19th day of March, 1859) a lien on said mortgaged premises, and of the members and holders of such bonds, of the amount due thereon, for interest or principal, of the number and amount of said bonds which are (were) pledged or held as collateral security for debts or obligations of said railroad company, and the amount of principal and interest due upon the debt or obligations for which said bonds are (were) so pledged or held as security;" that before said master said three hundred and twenty-two bonds were presented as the absolute property of said James B. Cross, and said railroad company, controlled and directed by said endorsers and directors, in pursuanee with their said fraudulent and corrupt agreement, suffered and permitted all of said three hundred and twenty-two bonds to be allowed without objection on their part, as though the same in fact had been issued and were outstanding at the time said decree was made as aforesaid, whereas in truth and in fact, as your orator is informed and believes, two hundred and eighty of said bonds had never been issued or disposed of by said railroad company, but that said company was expressly prohibited from making such issue and disposition of
25 said bonds by its contract under which they were deposited with said M. K. Jessup & Co. in 1857, as hereinbefore set forth; and your orator is informed, advised, and believes, and therefore charges, that the removal of the said two hundred and eighty bonds from the custody of said M. K. Jessup & Co., and the attempted pledge thereof as additional security to the liabilities of said railroad company and of its directors to said Johnston & Co., after the making and entry of said decree of foreclosure, and the subsequent sale of said bonds at auction, and the presentation thereof, as the absolute property of said Cross, before the said master, and all the acts of said Cross, Luddington & Scott, and of said railroad company, and of its directors, in reference thereto, were a gross fraud upon this court, as well as upon your orators and the other bona fide creditors of said railroad company, and that said Cross, Luddington & Scott acquired thereby no title to said bonds or to said road or the property and franchises of said railroad company, but that all of their proceedings in the premises were wholly fraudulent and void as against your orators and all the creditors of said railroad company.

Your orators further charge, upon information and belief, that the negotiations between said railroad directors and said Cross, Luddington & Scott for the release of said directors from their liability as endorsers began before the entry of said decree of foreclosure; that said Cross, Luddington & Scott, long before they purchased the said claims of said Johnston & Co., were well informed and knew in what manner and upon what conditions said two hundred and eighty bonds were held by said Jessup & Co., and how and by what means and for what purpose said bonds were taken from said Jessup & Co. and placed in the hands of said Johnston & Co., and they also knew that said railroad company was insolvent and was indebted
26 to your orators or said Boston Locomotive Works on said notes to a large amount, and that they, the said Cross, Lnddington & Scott, with such knowledge, corruptly and fraudulently conspired and confederated with said Hautel, Alton, Button, and Hull, directors and managers of said railroad company, to cheat and defraud your orators and the other creditors of said railroad company not secured by first mortgage bonds out of their just demands against said company; that the purchaser of said judgments and demands in favor of Johnston & Co., with said collateral bonds of said Cross, Luddington & Scott, the sale of said bonds at auction, and the purchase thereof on such sale by said Cross, and the presentation of said bond by said Cross, as the pretended absolute owner thereof, before the master under said decree of foreclosure, and all the acts and doings of said Cross, Luddington & Scott in reference to said bonds and said claims so purchased by them, and to said foreclosure, and to the said mortgaged premises, and also the acts and doings of said railroad company, aad of its directors and managers, in connection with or having any reference to said Cross, Luddington & Scott, or either of them, in the matters aforementioned, were had and done, as your orators is informed and believes, under and pursuant to and for the purpose of carrying out said fraudulent and corrupt agreement and understanding, made and entered into before said claims were transferred by said Johnston & Co. to said Cross, Luddington & Scott, and before said two hundred and eighty bonds came into the hands of said Johnson & Co. as security for said claims, whereby the said Heartel, Button, and Hull, who were directors of and controlled the board of directors of said railroad company, were to procure the absolute ownership and title of said railroad, franchises, and prop-
27 erty of said railroad company included in said mortgage, to be vested in said Cross, Luddington & Scott, freed and discharged from all claims and demands of the general creditors of said company and of all others not secured by said first mortgage, in consideration only that they, the said Cross, Luddington & Scott, would and should purchase said claims held by said Johnston & Co. against said railroad company and them, the said Button, Hull, and Hautel, as endorsers, and utterly release and discharge said endorsers therefrom, and said several proceedings hereinbefore detailed were had, in manner and form aforesaid, by collusion between said parties, and only the better to cover up and conceal the real purpose and intent of said contracting parties; and so your orators charge, upon information and belief, that said foreclosure of said mortgage, and the sale of said mortgaged premises, under the decree of this court, to said Cross, as hereinbefore set forth, were and are fraudulent and void as against your orators and the other creditors of said company; that the said transfer of said two hundred and eighty bonds from said Jessup & Co. to said Johnston & Co., and by them to said Cross for said Cross, Luddington & Scott, and the pretended sale of said three hundred and twenty-two bonds by said Cross, Luddington & Scott at auction, were and are fraudulent and wholly void as against your orators and the other creditors of said railroad com-

pany; that said Cross, Luddington & Scott, and those claiming under them, have not acquired any legal or valid title to said railroad, franchises, and property, or any part thereof, or by means of said foreclosure and sale, and ought not in equity to be permitted to hold the same as against your orators and the other creditors of said railroad company, and that the three hundred and twenty-two bonds still held by them ought to be surrendered and cancelled.

28 Your orators further show, upon information and belief, that the property and franchises of said railroad company included in said first mortgage at the time of the sale thereof by the marshal under said decree of foreclosure, were justly and reasonably worth between seventy-five thousand and one hundred thousand dollars; that within a few weeks after they had become the purchasers thereof at said marshal's sale said Cross, Luddington & Scott sold said two locomotive engines and tenders, said ten platform cars, about five hundred tons of railroad iron rails, and a quantity of railroad chairs and spike and ties taken from the roadbed of said railroad, and constituting part of said mortgaged property for an aggregate sum of about forty thousand dollars, which they, the said Cross, Luddington & Scott, have actually received therefor and held unaccounted for; and your orators further allege, upon information and belief, that the said James B. Cross, James Luddington, and Samuel B. Scott were jointly interested in all the matters aforesaid, although the name of only one of them was sometimes used in the various assignments, contracts, and other transactions connected with the purchase of said railroad and property, and that they still claim to be the owners of the moneys derived from the sale of the locomotives, tenders, platform cars, iron rails, &c., sold as aforesaid, and the remaining property and franchises of said railroad company; that your orators have been informed and believe that said Cross, Luddington & Scott have in some way attempted to form a new corporate organization, the name of which is unknown to your orators, to hold and manage said railroad and remaining property, and for that purpose have associated with themselves certain persons to your orators unknown (but who, when discovered, your orators pray may be made parties to this its bill) for the purpose

29 of constituting a board of directors of such new organization; but your orators aver, upon information and belief, that such persons have no interest in said property or franchises, unless they have acquired the same from said Cross, Luddington & Scott, or one of them, with full knowledge of the fraudulent and corrupt conduct hereinbefore set forth, and that in fact said Cross, Luddington & Scott have and claim still the sole and exclusive ownership and control of said railroad, franchises, and property under, through, and by virtue of said foreclosure sale.

And your orator further show unto your honor that this bill of complaint is not exhibited by collusion with the said defendants, or for the purpose of protecting the property and effects of the said Milwaukee and Superior Railroad Company, or any part thereof, against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of the money due upon the aforesaid judgment.

To the end, therefore, that the said defendants may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged as fully and particularly, paragraph by paragraph, as if the same were here again repeated and they thereto particularly interrogated; and not only to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information and belief; and that the said defendants may, if they can, show why your orators should not have the relief hereby prayed; and may, upon their several and respective corporal oaths, and according to

the best and utmost of their respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written, they are respectively required to answer, that is to say:

1st. Whether a judgment was not obtained by your orators against said Milwaukee and Superior Railroad Company in the name of the said Boston Locomotive Works, plaintiff, at the time, and in the manner, and for the amount as heretofore stated in this bill.

2nd. Whether execution was not issued upon said judgment to the marshal of the district of Wisconsin at the time and in the manner stated in this bill commanding said marshal to collect and return the same as stated in the bill.

3rd. Whether said marshal did not on or about the first Monday of December, eighteen hundred and sixty, return said execution, with his return endorsed thereon, as stated in this bill.

4th. Whether there is not justly and equitably due on said judgment the amount above stated in this bill.

5th. What property and effects, real, personal, and mixed, equitable as well as legal, of every description, goods, chattels, money, book accounts, due bills, promissory notes, bonds, mortgages, judgments, contracts, leasehold interests, equitable interests in real estate, contracts in relation to real estate, stocks of any and what incorporated company or joint stock company, and other choses in action, and effects belonged to the said Milwaukee and Superior Railroad Company, as well at the time of issuing said fieri facias as at the time of filing this bill, whether standing in name or in the hands of any other person or persons for its use, or in trust for it, either express or implied, and what disposition has been made of each of the same, and when and to whom and for what consideration, and how and when such consideration was paid, fully and particularly, and the amount, condition, situation, and value of each of them, the names and places of residence of the debtors respectively, and the evidence of their indebtedness, and that they may set forth and state how much is due on each of such demands, and which of them are good and collectable, and which of them are doubtful, and which of them are bad, and who has the possession, custody, or control of the said real and personal estate, goods, and chattels, book accounts, due bills, promissory notes, bonds, mortages, judgments, and other choses in action, and each of them.

6th. Whether the said Milwaukee and Superior Railroad Company was not incorporated and organized as is set forth in this bill, and for the purposes therein set forth.

7th. Whether the said Milwaukee and Superior Railroad Company did not resolve to and did not issue bonds for the purposes and of the amounts stated in this bill.

8th. Whether the said Milwaukee and Superior Railroad Company did not execute five hundred and fifty bonds, of one thousand dollars each, with interest coupons annexed, and did not execute and deliver to the Farmers' Loan and Trust Company, of the city of New York, a mortgage or trust deed, for the purpose of securing the payment of said bonds, on the property of said railroad company, as stated in this bill.

9th. Whether the said Milwaukee and Superior Railroad Company did not, on or about the fourth day of December, 1856, enter into a contract with Bailey Brothers & Co., of Liverpool, England, for the purchase of four thousand tons of iron rails for the tract of said company, for the purchase price of which said railroad company agreed to give the notes of said railroad company, due in six, nine, and twelve months from the delivery in New York, with interest added, and endorsed by C. R. Alton, H. Hautel, Edward

Button, and D. P. Hull, or others, in responsibility satisfactory to C. B. Raymond & Co., of New York; and that with said notes should be lodged first mortgage eight per cent. bonds of said railroad company at fifty per cent., or two dollars of bonds to one of notes.

31 10th. Whether the business of said railroad company was not managed and controlled by a board of directors, consisting of seven persons, a majority of whom constituted a quorum and were authorized to transact the business of said company; and whether the said Alton, Hautel, Button, and Hull were not each and every of them members of such board of directors of said railroad company at the time said contract was made by said railroad company with said Bailey Brothers & Co ; and also whether the said Hautel, Button, and Hull did not continue to be members of said board of directors until after a sale of the property of said company on a pretended foreclosure of mortgage an the road and property of said company.

11th. Whether the said Alton, Hautel, Button, and Hull did not assent to the making of said contract for iron and the terms and conditions thereof; whether the said railroad company did not, during the spring and summer of 1857, receive of said Baily Brothers & Co. a large quantity of iron in pursuance with said contract, amounting in value to between sixty and seventy thousand dollars, for which said railroad company gave its notes, due in six, nine, and twelve months from date; whether said notes were not, and each of them, endorsed by the said Alton, Hautel, Button, and Hull; and also whether the said railroad company did lodge in the hands of C. B. Raymond & Co , as agents of said Bailey Brothers & Co., an amount of the first mortgage bonds of said railroad company equal at their par value to double the amount of said notes, and discovering particularly the terms and conditions of said contract with said Bailey Brothers & Co., the quantity of iron received in pursuance with said contract, the respective dates and amounts of

32 each of the notes given by said railroad company for said iron, and which of them were endorsed by said Alton, Hautel, Button, and Hull, or either of them, and the number and amount of each and every first mortgage bond of said railroad company deposited with the said C. B. Raymond & Co. as collateral to said notes.

12th. Whether the said Milwaukee and Superior Railroad Company did, in the year 1857, and at what time, suspend the construction of its said railroad; whether the said railroad company had been or was at the time it suspended the construction of its road able to pay the notes it had given Bailey Brothers & Co. for iron rails; whether said railroad company did, with assent of said Alton, Hull, Hautel, and Button, return to said C. B. Raymond & Co., as agents of Bailey Brothers & Co., all of the iron rails which had not been laid on the road of said company; whether the said C. B. Raymond & Co., as agents of Bailey Brothers & Co., did not in consideration of the return of such iron surrender to said railroad company the notes given for said iron so returned, and also surrender and deliver up to said company a proportional amount of said first mortgage bonds as collateral; whether the said C. B. Raymond & Co. did not as such agents extend the time for the payment of the notes still held by said Bailey Brothers & Co., and unpaid six months from the date of their maturity, upon the security before given, to wit, the endorsement of said Alton, Hautel, Button, and Hull, and an amount of the first mortgage bonds of said railroad company equal, at their par value, to double the amount of said notes, and discovering particularly what amount of railroad iron was returned by said roilroad company to said C. B. Raymond & Co. as such agents, how much iron had been laid on the track of said road, what notes were surrendered by C. B. Raymond & Co.,

33 and the amount thereof, and the number and amount of the first mortgage bonds, respectively, surrendered by said C. B. Raymond & Co.,

the best and utmost of their respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written, they are respectively required to answer, that is to say:

1st. Whether a judgment was not obtained by your orators against said Milwaukee and Superior Railroad Company in the name of the said Boston Locomotive Works, plaintiff, at the time, and in the manner, and for the amount as heretofore stated in this bill.

2nd. Whether execution was not issued upon said judgment to the marshal of the district of Wisconsin at the time and in the manner stated in this bill commanding said marshal to collect and return the same as stated in the bill.

3rd. Whether said marshal did not on or about the first Monday of December, eighteen hundred and sixty, return said execution, with his return endorsed thereon, as stated in this bill.

4th. Whether there is not justly and equitably due on said judgment the amount above stated in this bill.

5th. What property and effects, real, personal, and mixed, equitable as well as legal, of every description, goods, chattels, money, book accounts, due bills, promissory notes, bonds, mortgages, judgments, contracts, leasehold interests, equitable interests in real estate, contracts in relation to real estate, stocks of any and what incorporated company or joint stock company, and other choses in action, and effects belonged to the said Milwaukee and Superior Railroad Company, as well at the time of issuing said fieri facias as at the time of filing this bill, whether standing in name or in the hands of any other person or persons for its use, or in trust for it, either express or implied, and what disposition has been made of each of the same, and when and to whom and for what consideration, and how and when such consideration was paid, fully and particularly, and the amount, condition, situation, and value of each of them, the names and places of residence of the debtors respectively, and the evidence of their indebtedness, and that they may set forth and state how much is due on each of such demands, and which of them are good and collectable, and which of them are doubtful, and which of them are bad, and who has the possession, custody, or control of the said real and personal estate, goods, and chattels, book accounts, due bills, promissory notes, bonds, mortages, judgments, and other choses in action, and each of them.

6th. Whether the said Milwaukee and Superior Railroad Company was not incorporated and organized as is set forth in this bill, and for the purposes therein set forth.

7th. Whether the said Milwaukee and Superior Railroad Company did not resolve to and did not issue bonds for the purposes and of the amounts stated in this bill.

8th. Whether the said Milwaukee and Superior Railroad Company did not execute five hundred and fifty bonds, of one thousand dollars each, with interest coupons annexed, and did not execute and deliver to the Farmers' Loan and Trust Company, of the city of New York, a mortgage or trust deed, for the purpose of securing the payment of said bonds, on the property of said railroad company, as stated in this bill.

9th. Whether the said Milwaukee and Superior Railroad Company did not, on or about the fourth day of December, 1856, enter into a contract with Bailey Brothers & Co., of Liverpool, England, for the purchase of four thousand tons of iron rails for the tract of said company, for the purchase price of which said railroad company agreed to give the notes of said railroad company, due in six, nine, and twelve months from the delivery in New York, with interest added, and endorsed by C. R. Alton, H. Hautel, Edward

Button, and D. P. Hull, or others, in responsibility satisfactory to C. B. Raymond & Co., of New York; and that with said notes should be lodged first mortgage eight per cent. bonds of said railroad company at fifty per cent., or two dollars of bonds to one of notes.

31 10th. Whether the business of said railroad company was not managed and controlled by a board of directors, consisting of seven persons, a majority of whom constituted a quorum and were authorized to transact the business of said company; and whether the said Alton, Hautel, Button, and Hull were not each and every of them members of such board of directors of said railroad company at the time said contract was made by said railroad company with said Bailey Brothers & Co ; and also whether the said Hautel, Button, and Hull did not continue to be members of said board of directors until after a sale of the property of said company on a pretended foreclosure of mortgage an the road and property of said company.

11th. Whether the said Alton, Hautel, Button, and Hull did not assent to the making of said contract for iron and the terms and conditions thereof; whether the said railroad company did not, during the spring and summer of 1857, receive of said Baily Brothers & Co. a large quantity of iron in pursuance with said contract, amounting in value to between sixty and seventy thousand dollars, for which said railroad company gave its notes, due in six, nine, and twelve months from date; whether said notes were not, and each of them, endorsed by the said Alton, Hautel, Button, and Hull; and also whether the said railroad company did lodge in the hands of C. B. Raymond & Co , as agents of said Bailey Brothers & Co., an amount of the first mortgage bonds of said railroad company equal at their par value to double the amount of said notes, and discovering particularly the terms and conditions of said contract with said Bailey Brothers & Co., the quantity of iron received in pursuance with said contract, the respective dates and amounts of

32 each of the notes given by said railroad company for said iron, and which of them were endorsed by said Alton, Hautel, Button, and Hull, or either of them, and the number and amount of each and every first mortgage bond of said railroad company deposited with the said C. B. Raymond & Co. as collateral to said notes.

12th. Whether the said Milwaukee and Superior Railroad Company did, in the year 1857, and at what time, suspend the construction of its said railroad; whether the said railroad company had been or was at the time it suspended the construction of its road able to pay the notes it had given Bailey Brothers & Co. for iron rails; whether said railroad company did, with assent of said Alton, Hull, Hautel, and Button, return to said C. B. Raymond & Co., as agents of Bailey Brothers & Co., all of the iron rails which had not been laid on the road of said company; whether the said C. B. Raymond & Co., as agents of Bailey Brothers & Co., did not in consideration of the return of such iron surrender to said railroad company the notes given for said iron so returned, and also surrender and deliver up to said company a proportional amount of said first mortgage bonds as collateral; whether the said C. B. Raymond & Co. did not as such agents extend the time for the payment of the notes still held by said Bailey Brothers & Co., and unpaid six months from the date of their maturity, upon the security before given, to wit, the endorsement of said Alton, Hautel, Button, and Hull, and an amount of the first mortgage bonds of said railroad company equal, at their par value, to double the amount of said notes, and discovering particularly what amount of railroad iron was returned by said roilroad company to said C. B. Raymond & Co. as such agents, how much iron had been laid on the track of said road, what notes were surrendered by C. B. Raymond & Co.,

33 and the amount thereof, and the number and amount of the first mortgage bonds, respectively, surrendered by said C. B. Raymond & Co.,

as such agents, to said railroad company; also the amount of the notes returned by said C. B. Raymond & Co., as such agents, the amount of each and by whom endorsed, and the number and amount of the bonds, respectively, returned by said C. B. Raymond & Co., as collateral security for said notes.

13th. Whether, at the time the said iron was returned to said C. B. Raymond & Co., as such agents, the said Milwaukee and Superior Railroad Company was not wholly insolvent; whether it resumed the construction of its said road; whether it has paid its liabilities; and whether the said directors, Alton, Hautel, Button, and Hull, did not, at the time said iron was returned to said C. B. Raymond & Co., know that the said railroad company was wholly insolvent, and also whether said railroad company ever executed any other bonds secured by said mortgage except the said five hundred and fifty.

14th. Whether, that at the time the first of the extended notes of said railroad company became due, said five hundred and fifty bonds were not held and disposed of as follows: forty-two of said bonds by C. B. Raymond & Co., as such agents, as collateral to said extended notes of said company, one hundred and twenty eight of said bonds held by the city of Milwaukee as an indemnity against loss by said city by reason of an alleged issue and loan of its corporate bonds to the amount of one hundred thousand dollars to said railroad company—one hundred of said bonds cancelled by a resolution of the board of directors of said railroad company, and two hundred and eighty of said bonds place in hands of M. K. Jessup & Co., of the city of New York; and whether said two hundred and eighty of said bonds,
34 placed in the hands of M. K. Jessup & Co., were not so placed there in pursuance of a resolution of the board of directors of said railroad company, to the effect and as set forth in this bill, and discovering particularly the numbers of each said bonds and the resolutions and agreements in pursuance of which said bonds were so disposed of and held.

15th. Whether the said railroad company did not, in the month of December, 1856, make and enter into an agreement with the Boston Locomotive Works, of Boston, Mass., for the purchase of several locomotive engines and tenders on a credit of nine and twelve months from the date of delivery; whether the said Boston Locomotive Works did not, in pursuance with such agreement, in the year 1857, deliver to said railroad company two engines and tenders at the agreed price of nine thousand dollars each, and for which said railroad company gave its notes in pursuance with such agreement; whether either or any part of said notes have been paid; and whether the judgment mentioned in this bill was not recovered upon said notes.

16th. Whether said railroad company did not, before it suspended the construction of its said tract, lay and complete about five miles of its road, and put thereon said two engines and tenders and ten platform cars; and whether said platform cars were not purchased by said company at a cost of about six thousand dollars.

17th. Whether said extended notes were paid when they became due; whether said Bailey Brothers & Co. did not, about the month of May, or some other time in the year 1858, and at what time, commence an action against said endorsers on said notes in the district court of the United States for the district of Wisconsin; whether, while said action was pending against said endorsers, the said endorsers did not apply to James Bowman Johnston & Co., who had become the agents of said Bailey Brothers &
35 Co., and request said James Bowman Johnston & Co., as such agents, to cause said mortgage or trust deed to be foreclosed; and whether said Johnston & Co., did not refuse to cause said mortgage to be foreclosed.

18th. Whether said endorsers on said notes were not still directors of said railroad company; whether said endorsers and directors, after said action had been commenced against them, did not apply to said Farmers' Loan and

Trust Company, the trustee named in said mortgage or trust deed, and make an arrangement with said Farmers' Loan and Trust Company, with the consent of said Johnston & Co., that a suit for the foreclosure of said mortgage should be commenced and prosecuted at the risk, and in case of failure at the expense, of said endorsers; that said suit should be conducted nominally by the attorneys of said Johnston & Co., but in fact by the attorney of said railroad company, under the direction of said endorsers and directors.

19th. Whether an action was not commenced in the said district court of the United States for the district of Wisconsin, in the month of December, 1858, for the foreclosure of said mortgage, in which said Farmers' Loan and Trust Company were named as complainants, purporting to be for the benefit of the holders of the bonds received by said mortgage; whether, in truth as in fact, said action was not commenced and conducted at the sole instance and request, and for the benefit of said endorsers, and at their risk and expense in case of failure; whether said suit was not conducted nominally in the name of the attorney of said Johnston & Co., but in fact by the attorneys of said railroad company, with the assistance of its officers; whether the subpœna in said suit was not served on the secretary of said railroad company only; whether the secretary of said railroad company was
36 not also its attorney; whether any defence was interposed by said railroad company to said action; whether the board of directors, or any of the officers of said railroad company, took any action to defeat said suit, or advise the shareholders or creditors of said railroad company that said suit was pending, and whether every effort was not made by said endorsers and directors to facilitate the proceedings in said suit, and to secure the full and complete discharge from their liabilities on said notes, regardless of the rights and interests of the bona fide creditors of said railroad company, and discovering particularly whether said arrangement was made with said Johnston & Co. in pursuance with a resolution of the board of directors of said railroad company, or how otherwise; whether all, or which, of said endorsers and directors presented said resolutions, or completed said arrangements, the names of the attorneys of said Johnston & Co., the time when said suit was commenced, and the name or names of the person or persons who proposed the bill in said suit for the foreclosure of said mortgage, the name or names of the person or persons performing all the services in said suit, and by whom they were were paid for said services.

20th. Whether the said endorsers and directors did not after said foreclosure suit was commenced, and while the same was pending, procure to be passed by the said board of directors of said railroad company a resolution on or about the third day of March, A. D. 1859, without the request of said Johnston & Co., or without any consideration moving to them from said Johnston & Co., and without the knowledge of said Johnston & Co., directing that said two hundred and eighty bonds deposited with M. K. Jessup & Co. should be transferred and delivered by said M. K. Jessup & Co. to said Johnston & Co., as agents of said Bailey Brothers & Co., as additional
37 security for said indebtedness of said railroad company for which said endorsers were liable, provided said Johnston & Co. should give their assent thereto; whether said first mortgage bonds were not delivered by M. K. Jessup & Co. to said Johnston & Co., and received by said Johnston & Co. on or about the first of May, 1859; whether said transfer and delivery was not voluntarily made by said board of directors, without any consideration, and whether the said railroad company received any benefit or advantage, and what, for such transfer; and discovering fully when said resolution of said board of directors was passed, and whether said directors were

all, or which of them, were present and voting, and whether said endorsers voted for or against said resolution.

21st. Whether said endorsers and directors did not after said foreclosure suit was commenced make an effort to find some person who would purchase of said Johnston & Co., as such agents, the notes held by said Johnston & Co. against said railroad company and said endorsers, and release said endorsers from all liabilities on said notes; whether one of the purposes of said endorsers in making said transfer of said two hundred and eighty bonds to said Johnston & Co. was not for the purpose of inducing some person to purchase said notes, and discharge said endorsers from their liabilities thereof; whether it was not also one of the purposes of the said endorsers in delivering to said Johnston & Co. said two hundred and eighty bonds that in case the moneys arising from the sale of the property described in said mortgage under the decree which would be rendered in said foreclosure suit should be insufficient to pay the face of said bonds, and that moneys should be equally divided among the holders of the bonds of said company, said Johnston & Co. would receive in virtue of said three hundred and
38 twenty-two bonds which they then held a sufficient sum to pay and satisfy said notes, and thus discharge said endorsers from their liabilities on said notes.

22d. Whether the said endorsers and directors did not before said two hundred and eighty bonds were delivered to said Johnston & Co. enter into negotiations with James B. Cross, James Luddington, and Samuel B. Scott, for the purchase by the said Cross, Luddington & Scott of the said Johnston & Co. as such agents of said claims against said railroad company, and said endorsers and directors; whether afterwards an arrangement and agreement was not entered into by said endorsers and directors, and said Cross, Luddington & Scott, that said endorsers should secure to said Cross, Luddington & Scott an absolute ownership of said mortgaged premises, and in order so to do should perfect the title of said Cross, Luddington & Scott to all of said first mortgage bonds held by said Johnston & Co. as collateral to said notes, and that in consideration thereof the said Cross, Luddington & Scott should purchase said notes of said Johnston & Co., and release and discharge said endorsers from all liability thereon, or a similar arrangement or agreement, and what, discovering and stating fully whether all or which of said endorsers made such arrangement and agreement, and at what time the same was made.

23d. Whether the said Cross, Luddington & Scott did not in pursuance with said agreement, and about the first day of May, 1859, purchase and receive from said Johnston & Co., as such agents, all of said notes against said railroad company and said endorsers, together with said three hundred and twenty-two bonds; whether said notes were not in judgment as against said endorsers at the time of such assignment by said Johnston &
39 Co. to said Cross, Luddington & Scott; whether said claims did not amount to less than twenty-three thousand dollars; whether the said Cross, Luddington & Scott did not purchase all of said claims and said three hundred and twenty-two bonds for the sum of about fourteen thousand dollars; whether the said Cross, Luddington & Scott did not at the time said arrangement and agreement was made with said directors and endorsers know and have knowledge of the placing of said bonds in the hands of M. K. Jessup & Co., and the trust and the purposes for which they were so placed in the hands of said M. K. Jessup & Co.; whether the said Cross, Luddington & Scott at the time did not have knowledge that the same had been transferred and delivered to said Johnston & Co. in pursurance with a resolution of said board of directors; that said endorsers were members of said board of directors, and that such transfer was made in pursuance of a resolution of said board, and for

the purpose of protecting said endorsers and directors from their liability on said notes; whether the negotiations with said Cross, Luddington & Scott was not carried out and completed by all or some of said endorsers, and who on the part of said railroad company, and whether said Cross, Luddington & Scott did not at the time such negotiations were commenced, carried on, and completed, have knowledge that said endorsers and directors were attempting to carry out and complete such negotiations and agreement with said Cross, Luddington & Scott for the purpose of procuring their own discharge and release from their liabilities on said notes as endorsers.

24th. Whether said assignment from said Johnston & Co. was taken in the name of James B. Cross, or said Cross, Luddington & Scott; if
40 taken in the name of James B. Cross, or of either said Cross, Luddington & Scott, whether it was not so taken for the benefit and advantage of said Cross, Luddington & Scott.

25th. Whether said Cross, Luddington & Scott, or James B. Cross, or some other person, and who, for said Cross, Luddington & Scott, in pursuance with said agreement on or about the 17th day of May, 1859, submit a written proposition to said board of directors to purchase said three hundred and twenty-two bonds then held by said Cross, Luddington & Scott, or said James B. Cross for said Cross, Luddington & Scott, and offering as a consideration for such purchase to discharge all of said claims upon said notes against said endorsers then being in judgment; whether said board of directors did not in response to said proposition on or about the said 17th day of May, 1859, pass a resolution authorizing the sale of said three hundred and twenty-two bonds at auction, on not less than five days' notice, on the condition that said Cross, Luddington & Scott, or said James B. Cross should bid thereon a sufficient sum to pay and discharge said claims against said endorsers; whether said bonds at that time had any market value; whether it was not well known by said board of directors, and by said Cross, Luddington & Scott that said bonds had no market value; whether pledging so large an amount of said bonds for so small an indebtedness did not depreciate the market value of said bonds; whether said proposition was not made by said Cross, and said resolution passed by said board of directors in pursuance of some arrangement or understanding, and what, between said endorsers and Cross, or Cross, Luddington & Scott, that said propositions should be so made, and said resolutions passed; and whether said
41 resolution of said board was not passed at the instance and request of said endorsers, who were members of said board of directors, and annexing a copy of said proposition of said Cross, and a copy of said resolution of said board to your answer.

26th. Whether a notice did not appear in some paper printed and published in the city of Milwaukee, on or about the 20th day of May, 1859, giving notice that three hundred and twenty-two bonds of said Milwaukee and Superior Railroad Company would be sold at auction on Saturday, the 28th day of May, 1859, at 12½ o'clock p. m., at the Chamber of Commerce; whether said notice was not printed in small type, and inserted in an obscure corner of said paper; whether said notice was signed by any person, or had any signature thereto, or any date; whether said notice was not drawn and caused to be so inserted in said paper by said endorsers, or said Cross, Luddington & Scott, or one of them, and which; whether any other or different notice was given or published of such sale; why said sale was made at the hour to 12½ p. m.; whether said bonds were sold in pursuance with said notice of said James B. Cross, or Cross, Luddington & Scott, for the sum of seventy dollars for each bond of one thousand dollars; whether the said James B. Cross was not the only bidder at such sale, and whether the money arising from said sale of said three hundred and twenty-two bonds at seventy dollars each was not about the sum due on said claims against said endorsers.

27th. Whether such of the claims against said endorsers as were not in judgment were not, on or about the 26th day of April, 1859, put in judgment by said Cross, Luddington & Scott, or some other persons, and who,
42 with the consent of said endorsers, and in some instances, and what, by confession of the said endorsers; whether the same were not so put in judgment in pursuance of an arrangement or agreement or understanding between said endorsers and directors and said Cross, Luddington & Scott, and whether after such pretended sale of said bonds at auction said Cross, Luddington & Scott, or one, and which of them, did not cause said judgment on said claims to be satisfied and discharged of record, and whether the said Cross, Luddington & Scott do not *do not* now claim to own and hold said three hundred and twenty-two bonds in virtue of said pretended sale at auction; that the said bonds and the interest coupons annexed constituted a valid indebtedness in favor of said Cross, Luddington & Scott, and against said railroad company; whether there is not due on said bonds the sum of nearly four hundred thousand dollars, and whether the said Cross, Luddington & Scott do not claim that they should be paid out of the moneys arising from the sale of said property of said railroad company under the decree in said foreclosure suit, the full sum due on said bonds before any part thereof could be applied to the payment of the debts of the bona fide creditors of said company.

28th. Whether the property and franchises of said railroad were not sold by the marshal of said district on or about the 27th day of August, 1859, under a decree rendered in said foreclosure suit; whether Cross, Luddington & Scott, or one of them, and which, for himself and the others, were the only real bidders at such sale; whether they, or one of them, and which, in behalf of themselves did not become the purchasers of said franchises and
43 property at the sum of twenty thousand dollars, or thereabouts; whether the said Cross, Luddington & Scott were not the only pretended first mortgage bond holders, and whether the said sum, after deducting the expenses of said trust company and the expenses of said foreclosure, was not returned to said Cross, Luddington & Scott, as the only first mortgage bond holders, discovering particularly the amount for which said property was struck off to said Cross, Luddington & Scott, or either and which of them, and the amount of the expenses of said loan and trust company, and of foreclosing of said mortgage, and the amount returned to said Cross, Luddington & Scott, after deducting such expenses.

29th. Whether at the time the said foreclosure suit was commenced the said Johnston & Co., as such agents, held more than the said forty-two bonds as collateral to said claims against said railroad co., and said endorsers; whether said foreclosure suit was not commenced for the benefit of the actual holders of the outstanding first mortgage bonds of said company, and whether said two hundred and eighty bonds were not at the time of the commencement of said foreclosure suit, and did not for a long time, and for what time thereafter, remain in the hands of M. K. Jessup & Co.

30th. Whether it was not in said foreclosure suit, on or about the 19th day of March, 1859, referred to a master to take an account of bonds that were in fact outstanding, and of the number and holders of such bonds as is stated in this bill; whether said three hundred and twenty-two bonds were not presented before said master by James B. Cross, or some person
44 for him, and by whom, as the absolute property of the said James B. Cross; whether said railroad company did not present the same to be allowed without objection; whether said bonds were not so allowed with the full knowledge and with the permission of said endorsers and directors, and at their request; whether the said bonds were not allowed for the purpose and with the intent to carry out and complete said arrangement and

agreement between said Cross, Luddington & Scott, and said endorsers and directors, for the purpose of procuring the discharge and release of said endorsers and directors.

31st. Whether the said negotiations between the said Cross, Luddington, and Scott, and one of them, and which, and said endorsers did not commence long before said decree was made in said foreclosure suit. Whether the said Cross, Luddington, and Scott did not, long before they purchased said claims of said Johnston & Co., well know in what manner and upon what conditions said two hundred and eighty bonds were held by said M. K. Jessup & Co. Whether they did not also know by what means and for what purpose said bonds were taken from the possession of said Jessup & Co., and placed in the hands of said Johnston & Co. Whether they did not also well know that said railroad company was insolvent and was indebted to your orators, or to said Boston Locomotive Works for said locomotive engines.

32d. Whether the franchises of said railroad company sold under the decree in said forclosure suit was not at the time of such sale worth between seventy-five and one hundred thousand dollars, or what sum. Whether the said Cross, Luddington, and Scott did not within a few weeks after such purchase by them of the property of said railroad com-
45 pany, and when, sell said two locomotive engines and tenders, said ten platform cars, and about five hundred tons of said railroad iron, and a quantity of railroad chairs and spikes and ties, taken from said railroad bed, for about the sum of forty thousand dollars, and what sum which the said Cross, Luddington, and Scott have actually received. Whether the said James B. Cross, James Ludington, and Samuel B. Scott were not in all of said matters equally interested when the name of only one of them was used in the various assignments, contracts and agreements made in carrying out such arrangement. Whether said Cross, Luddington, and Scott do not claim to be the absolute owners of the moneys arising from the sale by them of said engines, cars, &c., and also of the remaining franchise of said railroad company, or how otherwise, and the facts.

33d. Whether the said Cross, Ludington, and Scott have not attempted to form some new or different organization or corporation to hold and manage the remaining property and franchises of said railroad company. Whether said Cross, Ludington, have not associated with them some other person or persons for the purpose of forming such organization or corporation, and constituting a board of directors, and discovering the name or names of said person or persons. Whether such person or persons have any actual interest in said property or franchise; if they have, whether the same was not received by them from said Cross, Ludington, and Scott, or one of them, or how otherwise, with the knowledge of the manner in, and of the conditions upon, which the said Cross, Ludington, and Scott received the same; and whether the said Cross, Ludington, and Scott, have not in fact, or claim, the sole and exclusive control and ownership of said property and franchise.

46 34th. Whether said city of Milwaukee has not received from said Milwaukee and Superior Railroad Company, and has not in its possession a large amount of notes and mortgages, commonly known as farm mortgages, given by divers persons to said Milwaukee and Superior Railroad Company to secure to the said railroad company the payment of various sums of money, and discovering particularly at what time said notes and mortgages were delivered to said city of Milwaukee, for what particular purpose they were so delivered, also upon what condition, and in pursuance of what agreement, also the amount secured to be paid by said notes and mortgages respectively; and that said defendants, the Milwaukee

and Superior Railroad Company, may be decreed to pay to your orators the amount so as aforesaid due upon said judgment, both principal and interest, together with the costs and charges in this behalf sustained; and that the defendants to this your orators' bill of complaint may be decreed to apply for that purpose, any money or property, real or personal, in law or in equity, debts, chooses in action, or equitable interests belonging to said Milwaukee and Superior Railroad Company in the hands of any of said defendants, or under their control, or which are held in trust for it, the said railroad company, or any other person in which the said railroad company is in any way or manner beneficially interested; that said transfer of said two hundred and eighty bonds from the hands of said M. K. Jessup & Co. to said Johnston & Co., and from said Johnston & Co. to said Cross, Ludington, and Scott, or either of them, or to any other person for their or either of their benefit; that the sale of said three hundred and twenty-two bonds at auction, and the purchase thereof by said Cross, Ludington, and
47 Scott, or either of them; that the purchase of said property and franchise on said sale, and the payment of said sum of money arising from such sale to said Cross, Ludington, and Scott, and the conveyance of said franchise and property by said Marshall to them, and the sale of said property by said Cross, Ludington, and Scott, and all the transactions in relation thereto between said board of directors and said Cross, Ludington, and Scott, may be declared to be fraudulent and void as to the bona fide creditors of said railroad company, and particularly as to your orators, and gave said Cross, Ludington, and Scott, no right to or property in said franchises and other property, or the proceeds thereof, as against the bona fide creditors of said railroad company or your orators. That said transfer and delivery of said notes and mortgages to said city of Milwaukee was without any good or bona fide consideration, and fraudulent and void as against the *the* creditors of said railroad company and your orators. That said Cross, Ludington, and Scott be decreed to assign, transfer, and deliver to a receiver to be appointed by this court, all the property, franchise, and effects of whatever name or nature purchased at said sale under said decree, and now in their possession or under their control, and to account for and pay to said receiver all moneys or things received by them on a sale of any of said property so purchased by them at the sale under said decree. That the said city of Milwaukee be decreed to assign, transfer, and deliver to said receiver all of said notes and mortgages received by it from said railroad company.

48 And that a receiver of the money, property, and things in action of the said Milwaukee and Superior Railroad Company with the usual powers and authority may be appointed by this honorable court, and that the said Milwaukee and Superior Railroad Company may be directed to assign, transfer and deliver to the said receiver upon oath, under the direction of a master of this court, all its property, equitable interest, things in action, money, and effects, and all the books and papers relating thereto, and the evidence thereof; and that your orators may have satisfaction for the sum due to them on the said judgment, together with the costs and charges in this behalf, out of the said money, property, equitable interests, and things in action of the said Milwaukee and Superior Railroad Company, and that the said railroad company and its attorneys, counsellors, solicitors, agents, trustees, and servants, may be enjoined from collecting, receiving, selling, transferring, assigning, delivering, or in any way or manner using, controlling, encumbering, or disposing of any debts or demands due to it, or any real or personal estate, goods, wares, merchandizes, account books, bills, checks, promissory notes, bonds, mortgages, judgments or other securities, things in action, property or effects, whether in its own

name or hands, or in the names or hands of or held by any other person or persons for its use or benefit or in trust for it, express or implied, except where such trust has been created by or the fund held in trust has proceeded from some person other than the said Milwaukee and Superior Railroad Company, until the further order of this honorable court; that the said defendants, Cross, Ludington, and Scott, their agents, attorneys, or servants, may be enjoined from selling, transferring, assigning, or in any way or manner disposing of said property and franchises so purchased by them at such sale, or of the proceeds of any sales that they may have made thereof, or in any way or manner using or incumbering the same; and that the said city of Milwaukee, its agents, attorneys, or officers, may be enjoined from selling, assigning, transferring, delivering, or in any manner disposing of, or incumbering, or meddling with said notes and mortgages so delivered to it by said railroad company until the further order of this court.

And that the said Milwaukee and Superior Railroad Company may be decreed to pay your orators their costs and charges in this behalf most wrongfully sustained, or that your orator may have such other or further relief in the premises, or both, as to your honor shall seem meet, and shall be agreeable to equity and good conscience.

May it please your honor to grant unto your orators a writ of injunction to be issued out of and under the seal of this honorable court, directed to the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, and their attorneys, counsellors, solicitors, agents, trustees and servants, therein and thereby, under a certain penalty in the said writ to be expressed, commanding and enjoining them and each of them in manner as aforesaid, until the further order of this honorable court.

May it also please your honor to grant unto your orators a writ of subpœna, issued out of and under the seal of this honorable court, to be directed to the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, commanding them at a certain day, and under a certain penalty therein to be inserted, personally to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as to your honor shall seem agreeable to equity and good conscience. And your orators will ever pray, &c.

PRICHARD & JACKSON,
Complainants' Solicitor.
J. H. KNOWLTON,
MAT. H. CARPENTER,
Of Counsel.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

Personally appeared before me on this fourteenth day of January, A. D. 1861, A. A. Jackson, who, being by me duly sworn, did depose and say that he is the attorney of the above-named complainant, who resides in the State of Massachusetts, and that he is more familiar with the facts hereinbefore set forth than said complainant; that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information or belief of the complainant, and as to those matters he believes it to be true.

AMOS P. PRICHARD,
County Judge of Rock County, Wis.

49 And same day, January 14th, 1861, the said complainants, by their said solicitors, entered a rule for an injunction and receiver, as follows:

Rule for injunction, &c., &c.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES of the Boston Locomotive Works, *vs*, MILWAUKEE AND SUPERIOR RAILROAD COMPANY, the city of Milwaukee; James B. Cross, James Ludington, and Samuel B. Scott.	In equity, January 14th, 1861.

On motion of Prichard & Jackson, compl'ts' sol's, ordered that the defendants show cause by Monday, the 14th day of January inst., at 10 o'clock a. m., why an injunction should not be issued and a receiver be appointed, according to the prayer of the bill on file.

PRICHARD & JACKSON, *Compl'ts' Sols.*

Whereupon a subpœna issued as follows:

50 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

The President of the United States to Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, greeting: [SEAL.]

You are hereby commanded that you personally appear before the judge of the district court of the United States of America for the district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of February next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by G. P. Drury and William Page, assignees of the Boston Locomotive Works, and to do further and receive what our said court shall have considered in that behalf, and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, if to be found in his district, and due return thereof make.

Witness the Honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, at the city of Milwaukee, in the said district, this fourteenth day of January, in the year of our Lord one thousand eight hundred and sixty-one, and of our independence the eighty-fifth.

J. M. MILLER, *Clerk.*

PRICHARD & JACKSON, *Solicitors.*

It is ordered by our court, that the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, the defendant aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise, the bill filed may be taken as confessed. And it is further ordered that they show cause by Monday, the twenty-first day of January instant, at ten o'clock in the forenoon, why an injunction should not be issued and a receiver be appointed according to the prayer of the bill on file.

51 And afterwards, and on or before the return day of said subpœna came the said marshal and returned the same, with his return endorsed thereon as follows:

Return.

Served on the within-named Milwaukee and Superior Railroad Company, by delivering a copy of this subpœna personally to H. Hautel, one of the directors of said company, by leaving a copy of this subpœna at the usual place of abode of Joshua Stark, president of said company. Served upon the within-named the city of Milwaukee, by delivering a copy of this subpœna personally to Francis Huebshman, acting mayor, and a copy to George G. Dousman, clerk of said city. Served on the within-named James B. Cross, James Ludington, and Samuel B. Scott, by delivering a copy of this subpœna personally to each of them this fourteenth day of January, 1861.

Fees $16 98.

J. H. LEWIS, *Marshal.*

And afterwards, to wit, on the first Monday of February, A. D. 1861, came the complainants, by their solicitors, and entered in the Order and Rule Book a rule to plead according to the rules and practice of the court as follows, to wit:

Rule to plead.

G. P. Drury and William Page, assignees of the Boston Locomotive Works,
vs.
Milwaukee and Superior Railroad Company, the City of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.
} In equity, Feb'y 4, 1861.

On motion of Prichard & Jackson, complainants' solicitors, it is ordered that the said defendants and each of them appear and plead, answer, or demur to the complainants' bill on file by the first Monday of March next, or said bill will be taken as confessed.

PRICHARD & JACKSON, *Compl'ts' Sol'rs.*

And afterwards, to wit, on the twenty-eighth day of February, 1861, came the defendants James B. Cross, James Ludington, and Samuel B. Scott, by their solicitors, Messrs. Emmons, Van Dyke & Hamilton, and filed their demurrer as follows, to wit:

52 *Demurrer.*

District court of the United States for the district of Wisconsin, in equity.

G. P. Drury and William Page, assignees of the Boston Locomotive Works,
vs.
The Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

The demurrer of James B. Cross, James Ludington, and Samuel B. Scott, defendants, to the bill of complaint of G. P. Drury and William Page, assignees of the Boston Locomotive Works, complainants.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true, in such manner and form as the same are therein set forth and alleged, to demur thereto, and for cause of demurrer show that the said complainants have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought

49 And same day, January 14th, 1861, the said complainants, by their said solicitors, entered a rule for an injunction and receiver, as follows:

Rule for injunction, &c., &c.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES of the Boston Locomotive Works,
vs.
MILWAUKEE AND SUPERIOR RAILROAD COMPANY, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott. } In equity, January 14th, 1861.

On motion of Prichard & Jackson, compl'ts' sol's, ordered that the defendants show cause by Monday, the 14th day of January inst., at 10 o'clock a. m., why an injunction should not be issued and a receiver be appointed, according to the prayer of the bill on file.

PRICHARD & JACKSON, *Compl'ts' Sols.*

Whereupon a subpœna issued as follows:

50 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

The President of the United States to Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, greeting:

[SEAL.]

You are hereby commanded that you personally appear before the judge of the district court of the United States of America for the district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of February next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by G. P. Drury and William Page, assignees of the Boston Locomotive Works, and to do further and receive what our said court shall have considered in that behalf, and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, if to be found in his district, and due return thereof make.

Witness the Honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, at the city of Milwaukee, in the said district, this fourteenth day of January, in the year of our Lord one thousand eight hundred and sixty-one, and of our independence the eighty-fifth.

J. M. MILLER, *Clerk.*

PRICHARD & JACKSON, *Solicitors.*

It is ordered by our court, that the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, the defendant aforesaid, do enter their appearance in said suit, in the clerk's office, on or before the day and time at which the subpœna is returnable, as aforesaid; otherwise, the bill filed may be taken *confessed*. And it is further ordered that they show cause by Monday, the twenty-first day of January instant, at ten o'clock in the forenoon, why an injunction should not be issued and a receiver be appointed according to the prayer of the bill on file.

51 And afterwards, and on or before the return day of said subpœna, came the said marshal and returned the same, with his return endorsed thereon as follows:

Served on the ... said company; and
by delivering ... ached, marked "A," is
directors of ... ortgages respectfully,
place of abode ... t and general descrip-
the within ... names of the several
pœna personally ... s answer; that none of
G. Douseman, ... secured thereby, have
James Ludington, ... wering, this defendant
pœna personally ... d Company was duly
Fees $1.6 ... of Wisconsin, approved
... ad maintaining a rail-
... Railroad Company, in
... described in said bill;
And after ... ases of railroad corpora-
came the ... wer to intersect and con-
Book a rule ... te of Wisconsin, and con-
follows, to ... that said company was
... d with the work for which
... its said road so as to be
G. P. Drury ... ack of the La Crosse and
... northward for some distance,
Milwaukee ... ad and connect its railroad
of Milwaukee ... ion of said two roads, and
too, and ... ward, treating such point of
... nstruction for the present; and
On motion ... Company had been fully and
that the ... se of constructing a railroad as
demur to the ... Milwaukee, on the 16th day of
said bill was ... An ordinance to authorize an
... Superior Railroad Company," of
And after ... to wit:
the defendants ... the construction of the Milwau-
their solicitor ... be issued and delivered to the
demurrer ... to an amount not exceeding one
... conditions mentioned in an act
... its credit in aid of a certain rail-
52 ... subsequent acts amendatory
... hereinafter mentioned, provided the
District ... ceeds thereof shall be expended in
... railroad between the city of Mil...
G. P. Drury ...
... the authority contained in ...
The Mil... to 20 years from the date ...
the ... rate of seven per cent.
... payable at the Union ...
Lehmann ... shall be signed by ...
... the common council ...
The ...
defendants ... issued to said railroad ...
... and securities to be ...
... entitled "An act ...
... and of certain railroa...
... and to the satisfa...
... shall not be in force ...
... at an election ...
... and adopted by a ...

49 And same day, January 14th, 1861, the said complainants, by their said solicitors, entered a rule for an injunction and receiver, as follows:

Rule for injunction, &c., &c.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES of the Boston Locomotive Works,
vs,
MILWAUKEE AND SUPERIOR RAILROAD COMPANY, the city of Milwaukee; James B. Cross, James Ludington, and Samuel B. Scott. } In equity, January 14th, 1861.

On motion of Prichard & Jackson, compl'ts' sol's, ordered that the defendants show cause by Monday, the 14th day of January inst., at 10 o'clock a. m., why an injunction should not be issued and a receiver be appointed, according to the prayer of the bill on file.

PRICHARD & JACKSON, *Compl'ts' Sols.*

Whereupon a subpœna issued as follows:

50 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

The President of the United States to Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, greeting: [SEAL.]

You are hereby commanded that you personally appear before the judge of the district court of the United States of America for the district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of February next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by G. P. Drury and William Page, assignees of the Boston Locomotive Works, and to do further and receive what our said court shall have considered in that behalf, and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, if to be found in his district, and due return thereof make.

Witness the Honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, at the city of Milwaukee, in the said district, this fourteenth day of January, in the year of our Lord one thousand eight hundred and sixty-one, and of our independence the eighty-fifth.

J. M. MILLER, *Clerk.*

PRICHARD & JACKSON, *Solicitors.*

It is ordered by our court, that the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, the defendant aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise, the bill filed may be taken as confessed. And it is further ordered that they show cause by Monday, the twenty-first day of January instant, at ten o'clock in the forenoon, why an injunction should not be issued and a receiver be appointed according to the prayer of the bill on file.

51 And afterwards, and on or before the return day of said subpœna came the said marshal and returned the same, with his return endorsed thereon as follows:

Return.

Served on the within-named Milwaukee and Superior Railroad Company, by delivering a copy of this subpœna personally to H. Hautel, one of the directors of said company, by leaving a copy of this subpœna at the usual place of abode of Joshua Stark, president of said company. Served upon the within-named the city of Milwaukee, by delivering a copy of this subpœna personally to Francis Huebshman, acting mayor, and a copy to George G. Dousman, clerk of said city. Served on the within-named James B. Cross, James Ludington, and Samuel B. Scott, by delivering a copy of this subpœna personally to each of them this fourteenth day of January, 1861.

Fees $16 98.

J. H. LEWIS, *Marshal.*

And afterwards, to wit, on the first Monday of February, A. D. 1861, came the complainants, by their solicitors, and entered in the Order and Rule Book a rule to plead according to the rules and practice of the court as follows, to wit:

Rule to plead.

G. P. Drury and William Page, assignees of the Boston Locomotive Works, *vs.* Milwaukee and Superior Railroad Company, the City of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.	In equity, Feb'y 4, 1861.

On motion of Prichard & Jackson, complainants' solicitors, it is ordered that the said defendants and each of them appear and plead, answer, or demur to the complainants' bill on file by the first Monday of March next, or said bill will be taken as confessed.

PRICHARD & JACKSON, *Compl'ts' Sol'rs.*

And afterwards, to wit, on the twenty-eighth day of February, 1861, came the defendants James B. Cross, James Ludington, and Samuel B. Scott, by their solicitors, Messrs. Emmons, Van Dyke & Hamilton, and filed their demurrer as follows, to wit:

52 *Demurrer.*

District court of the United States for the district of Wisconsin, in equity.

G. P. Drury and William Page, assignees of the Boston Locomotive Works, *vs.* The Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.	

The demurrer of James B. Cross, James Ludington, and Samuel B. Scott, defendants, to the bill of complaint of G. P. Drury and William Page, assignees of the Boston Locomotive Works, complainants.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true, in such manner and form as the same are therein set forth and alleged, to demur thereto, and for cause of demurrer show that the said complainants have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought

49 And same day, January 14th, 1861, the said complainants, by their said solicitors, entered a rule for an injunction and receiver, as follows:

Rule for injunction, &c., &c.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES of the Boston Locomotive Works,
vs,
MILWAUKEE AND SUPERIOR RAILROAD COMPANY, the city of Milwaukee; James B. Cross, James Ludington, and Samuel B. Scott. } In equity, January 14th, 1861.

On motion of Prichard & Jackson, compl'ts' sol's, ordered that the defendants show cause by Monday, the 14th day of January inst., at 10 o'clock a. m., why an injunction should not be issued and a receiver be appointed, according to the prayer of the bill on file.

PRICHARD & JACKSON, *Compl'ts' Sols.*

Whereupon a subpœna issued as follows:

50 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

The President of the United States to Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James [SEAL.] Ludington, and Samuel B. Scott, greeting:

You are hereby commanded that you personally appear before the judge of the district court of the United States of America for the district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of February next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by G. P. Drury and William Page, assignees of the Boston Locomotive Works, and to do further and receive what our said court shall have considered in that behalf, and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, if to be found in his district, and due return thereof make.

Witness the Honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, at the city of Milwaukee, in the said district, this fourteenth day of January, in the year of our Lord one thousand eight hundred and sixty-one, and of our independence the eighty-fifth.

J. M. MILLER, *Clerk.*

PRICHARD & JACKSON, *Solicitors.*

It is ordered by our court, that the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, the defendant aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise, the bill filed may be taken as confessed. And it is further ordered that they show cause by Monday, the twenty-first day of January instant, at ten o'clock in the forenoon, why an injunction should not be issued and a receiver be appointed according to the prayer of the bill on file.

51 And afterwards, and on or before the return day of said subpœna came the said marshal and returned the same, with his return endorsed thereon as follows:

Return.

Served on the within-named Milwaukee and Superior Railroad Company, by delivering a copy of this subpœna personally to H. Hautel, one of the directors of said company, by leaving a copy of this subpœna at the usual place of abode of Joshua Stark, president of said company. Served upon the within-named the city of Milwaukee, by delivering a copy of this subpœna personally to Francis Huebshman, acting mayor, and a copy to George G. Dousman, clerk of said city. Served on the within-named James B. Cross, James Ludington, and Samuel B. Scott, by delivering a copy of this subpœna personally to each of them this fourteenth day of January, 1861.

Fees $16 98.

J. H. LEWIS, *Marshal.*

And afterwards, to wit, on the first Monday of February, A. D. 1861, came the complainants, by their solicitors, and entered in the Order and Rule Book a rule to plead according to the rules and practice of the court as follows, to wit:

Rule to plead.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES OF THE Boston Locomotive Works,
vs.
MILWAUKEE AND SUPERIOR RAILROAD COMPANY, THE CITY of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.
} In equity, Feb'y 4, 1861.

On motion of Prichard & Jackson, complainants' solicitors, it is ordered that the said defendants and each of them appear and plead, answer, or demur to the complainants' bill on file by the first Monday of March next, or said bill will be taken as confessed.

PRICHARD & JACKSON, *Compl'ts' Sol'rs.*

And afterwards, to wit, on the twenty-eighth day of February, 1861, came the defendants James B. Cross, James Ludington, and Samuel B. Scott, by their solicitors, Messrs. Emmons, Van Dyke & Hamilton, and filed their demurrer as follows, to wit:

52 *Demurrer.*

District court of the United States for the district of Wisconsin, in equity.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES OF THE Boston Locomotive Works,
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

The demurrer of James B. Cross, James Ludington, and Samuel B. Scott, defendants, to the bill of complaint of G. P. Drury and William Page, assignees of the Boston Locomotive Works, complainants.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true, in such manner and form as the same are therein set forth and alleged, to demur thereto, and for cause of demurrer show that the said complainants have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought

49 And same day, January 14th, 1861, the said complainants, by their said solicitors, entered a rule for an injunction and receiver, as follows:

Rule for injunction, &c., &c.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES of the Boston Locomotive Works, *vs*, MILWAUKEE AND SUPERIOR RAILROAD COMPANY, the city of Milwaukee; James B. Cross, James Ludington, and Samuel B. Scott.	In equity, January 14th, 1861.

On motion of Prichard & Jackson, compl'ts' sol's, ordered that the defendants show cause by Monday, the 14th day of January inst., at 10 o'clock a. m., why an injunction should not be issued and a receiver be appointed, according to the prayer of the bill on file.

PRICHARD & JACKSON, *Compl'ts' Sols.*

Whereupon a subpœna issued as follows:

50 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

[SEAL.] The President of the United States to Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, greeting:

You are hereby commanded that you personally appear before the judge of the district court of the United States of America for the district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of February next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by G. P. Drury and William Page, assignees of the Boston Locomotive Works, and to do further and receive what our said court shall have considered in that behalf, and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, if to be found in his district, and due return thereof make.

Witness the Honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, at the city of Milwaukee, in the said district, this fourteenth day of January, in the year of our Lord one thousand eight hundred and sixty-one, and of our independence the eighty-fifth.

J. M. MILLER, *Clerk.*

PRICHARD & JACKSON, *Solicitors.*

It is ordered by our court, that the said Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, the defendant aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise, the bill filed may be taken as confessed. And it is further ordered that they show cause by Monday, the twenty-first day of January instant, at ten o'clock in the forenoon, why an injunction should not be issued and a receiver be appointed according to the prayer of the bill on file.

51 And afterwards, and on or before the return day of said subpœna came the said marshal and returned the same, with his return endorsed thereon as follows:

Return.

Served on the within-named Milwaukee and Superior Railroad Company, by delivering a copy of this subpœna personally to H. Hautel, one of the directors of said company, by leaving a copy of this subpœna at the usual place of abode of Joshua Stark, president of said company. Served upon the within-named the city of Milwaukee, by delivering a copy of this subpœna personally to Francis Huebshman, acting mayor, and a copy to George G. Dousman, clerk of said city. Served on the within-named James B. Cross, James Ludington, and Samuel B. Scott, by delivering a copy of this subpœna personally to each of them this fourteenth day of January, 1861.

Fees $16 98.

J. H. LEWIS, *Marshal.*

And afterwards, to wit, on the first Monday of February, A. D. 1861, came the complainants, by their solicitors, and entered in the Order and Rule Book a rule to plead according to the rules and practice of the court as follows, to wit:

Rule to plead.

G. P. Drury and William Page, assignees of the Boston Locomotive Works,
vs.
Milwaukee and Superior Railroad Company, the City of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.
} In equity, Feb'y 4, 1861.

On motion of Prichard & Jackson, complainants' solicitors, it is ordered that the said defendants and each of them appear and plead, answer, or demur to the complainants' bill on file by the first Monday of March next, or said bill will be taken as confessed.

PRICHARD & JACKSON, *Compl'ts' Sol'rs.*

And afterwards, to wit, on the twenty-eighth day of February, 1861, came the defendants James B. Cross, James Ludington, and Samuel B. Scott, by their solicitors, Messrs. Emmons, Van Dyke & Hamilton, and filed their demurrer as follows, to wit:

52 *Demurrer.*

District court of the United States for the district of Wisconsin, in equity.

G. P. Drury and William Page, assignees of the Boston Locomotive Works,
vs.
The Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

The demurrer of James B. Cross, James Ludington, and Samuel B. Scott, defendants, to the bill of complaint of G. P. Drury and William Page, assignees of the Boston Locomotive Works, complainants.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true, in such manner and form as the same are therein set forth and alleged, to demur thereto, and for cause of demurrer show that the said complainants have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought

and prayed for from or against these defendants. Wherefore these defendants demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with their reasonable costs in this behalf sustained.

EMMONS, VAN DYKE & HAMILTON,
Sol'rs for s'd Def'ts.

C. A. HAMILTON, *of Counsel.*

53 I certify that in my opinion the above demurrer is well founded in point of law.

CHARLES A. HAMILTON, *of Counsel.*

DISTRICT OF WISCONSIN, *ss:*

James B. Cross, being duly sworn, says that he is one of the defendants in the foregoing demurrer named. He further says that said demurrer is not interposed for delay.

J. B. CROSS.

Subscribed and sworn to before me this 28th day of February, 1861.

WILLIAM A. COLLINS,
Notary Public, Mil. Co., Wisconsin.

And afterwards, to wit, on the first day of April, 1861, came the defendant the city of Milwaukee by its attorney, Mr. La Due, and filed its answer as follows, to wit:

54 *Answer of the city of Milwaukee.*

The separate answer of the city of Milwaukee, one of the defendants impleaded with the Milwaukee and Superior Railroad Company, James B. Cross, James Ludington, and Samuel B. Scott, to the bill of complaint of G. P. Drury and William Page, assignees of the Boston Locomotive Works, complainants.

This defendant, now and at all times saving and reserving to itself all and all manner of benefit and advantage of exception to the said bill on account of the many errors and insufficiencies therein contained, for answer thereunto, or unto so much and such facts thereof as it is advised is or are material or necessary to be answered unto by this defendant, answer and say that as to the various averments in said bill respecting the alledged indebtedness and cause of indebtedness of said railway company to the assignor of the plaintiffs, the alledged recovery of judgment therefor, and the issue and return of execution thereunder, the assignment of that debt to the complainants, their ownership of the same, and the alledged amount now still due and unpaid thereon, this defendant has no knowledge, but leaves the complainants to their proof upon those points. And further answering, this defendant says that it has in its possession a number of notes accompanied and secured by mortgages upon real estate along or near the line of said railroad, (of the kind commonly called farm mortgages,) which in the aggregate amount to fifty thousand dollars or thereabouts, which were originally given by sundry persons, the makers thereof, to said company in payment of their respective stock subscription to the capital stock of that company, and which were transferred to and deposited with this city as security for the undertaking of the said company hereinafter mentioned to pay, satisfy, and discharge the principal and interest of all city bonds of this defendant which should be issued to said company,
55 being the same city bonds hereinafter mentioned, and to indemnify and save harmless this city from all loss, damage, and injury to arise

to it by or on account of the issue of said city bonds to said company; and this defendant says that the list or schedule hereto attached, marked "A," is a correct statement of the dates of those notes and mortgages respectfully, the amounts secured thereby, the substantial but short and general description of the lands described therein respectively, and names of the several mortgagors, which schedule is hereby made part of this answer; that none of the monies, except it be some instalments of interest secured thereby, have been paid or are due and payable. And further answering, this defendant says that the said Milwaukee and Superior Railroad Company was duly incorporated by an act of the legislature of the State of Wisconsin, approved March 4th, 1856, for the purpose of constructing and maintaining a railroad from the depot of the Milwaukee and Chicago Railroad Company, in the city of Milwaukee, northward along the route described in said bill; that it was clothed with the usual power and franchises of railroad corporations, and specially, in addition thereto, with full power to intersect and connect its railroad with any other railroad in the State of Wisconsin, and consolidate therewith or operate the same therewith; that said company was duly organized under its said charter and proceeded with the work for which it was created; that it did commence to construct its said road so as to be able conveniently to avail itself of the road and track of the La Crosse and Milwaukee Railroad Co., from Milwaukee northward for some distance,
56 and did intersect the last named railroad and connect its railroad therewith at a point known as the junction of said two roads, and proceeded to build its road from that point northward, treating such point of junction as the starting point in its actual construction for the present; and after the said Milwaukee and Superior Railroad Company had been fully and duly incorporated and organized for the purpose of constructing a railroad as aforesaid, the common council of the city of Milwaukee, on the 16th day of June, 1856, passed an ordinance entitled "An ordinance to authorize an issue of city bonds to the Milwaukee and Superior Railroad Company," of which the following is a copy in substance, to wit:

Section 1. For the purpose of aiding in the construction of the Milwaukee and Superior Railroad, city bonds may be issued and delivered to the Milwaukee and Superior Railroad Company to an amount not exceeding one hundred thousand dollars, on the terms and conditions mentioned in an act authorizing the city of Milwaukee to loan its credit in aid of a certain railroad, approved April 2d, 1853, and sundry subsequent acts amendatory thereof, and on the terms and conditions hereinafter mentioned, provided the bonds issued to said company or the proceeds thereof shall be expended in the construction of that part of said railroad between the city of Milwaukee and the city of Sheboygan.

Section 2. Every bond issued under the authority contained in the preceding section shall be made payable in 20 years from the date thereof, with interest, payable semi-annually, at the rate of seven per cent. per annum, and both principal and interest payable at the Union Bank of New
57 York, in the city of New York, shall be signed by the mayor and countersigned by the clerk of the common council under the corporate seal of the city.

Section 3. No bond shall be issued to said railroad company till all the provisions relating to the bonds and securities to be given and furnished to said city, as provided in the act entitled "An act authorizing the city of Milwaukee to loan its credit in aid of certain railroads," are fully complied with on the part of said company, and to the satisfaction of the common council.

Section 4. This ordinance shall not be in force until submitted to the legal voters of the city of Milwaukee, at an election held for that purpose at the time hereinafter provided, and adopted by a majority of the whole number of votes cast at such election.

SECTION 5. An election shall be held on Monday, the 4th day of August, 1856, between the hours of three and seven o'clock in the afternoon of that day, at the places in the several wards of the city where the last elections were held, for the purpose of the adoption or rejection of this ordinance, and such election shall be conducted and the votes canvassed and returned in the same manner and by the same officers as other city elections.

SECTION 6. On the ballots which shall be received by the inspectors of such election shall be either written or printed the words "for the railroad ordinance," or the words "against the railroad ordinance."

SECTION 7. At the next meeting of the common council after the returns of such election from the several wards in the city are made to the city
58 clerk, the common council shall proceed to canvass such returns, and if it be found that a majority of the whole number of votes taken are in favor of this ordinance, it shall be the duty of the mayor to make proclamation thereof in the official paper of the city; and this ordinance shall be in force from and after its first publication subsequent to the date of such proclamation.

Passed June 16th, 1856.

J. B. CROSS, *Mayor.*

R. WHITEHEAD, *City Clerk.*

And this defendant, further answering, saith that, in pursuance of the provisions of the foregoing ordinance, an election was held on the 4th Monday of August, 1856, at the places mentioned in said ordinance, and at such election a majority of the legal voters of said city voting thereat voted in favor of issuing said city bonds to said company in manner aforesaid; and the votes cast at such election were duly canvassed by the common council of said city, and the result of such election was duly ascertained to be in favor of the issue of such city bonds to said company, and legally declared, certified, and recorded; whereupon the mayor of said city made due proclamation as in said ordinance provided, and said ordinance was immediately thereafter duly published.

And further answering, this defendant says that afterwards, and before January 10th, 1857, the said company petitioned said common council for the issue and delivery to said company of said bonds, pursuant to the conditions and provisions of said ordinance passed June 16, 1856, and to
59 the vote of the legal voters of said city above referred to, which petition was referred to the committee on railroads, of which committee Alderman Greurch was chairman; that on January 10th, 1857, said committee reported in favor of the issue of said bonds on certain conditions, and, among others, that a personal bond of certain directors of said company should be given, conditioned as hereinafter stated; that on the second day of February, A. D. 1857, said committee recommending the issue by said city to said company of one hundred thousand dollars of city bonds on the conditions in their two reports aforesaid particularly set out, among which conditions was the following, to wit: said company shall, as a further collateral security for the performance of the covenants and conditions of the personal bond in said report referred to, assign and deliver to the city treasurer fifty thousand dollars of the farm mortgages—bonds of said company secured by farm mortgages on real estate, near the line of said railroad—to be delivered by said city to said company whenever the said road shall be completed ready for the superstructure from the junction of the La Crosse and Milwaukee railroad to the junction with the air line railroad, at or near Cedarburg, in Ozaukee County," which report of said committee, including the foregoing provision, was adopted by said council February 2d, 1857, and thereupon the transfer to said city of said notes and mortgages, being a con-

dition of the issue of said city bonds to said company, was made by said company as aforesaid.

And further answering, this defendant shows that, by an ordinance
60 of said city passed February 14, 1857, entitled "An ordinance to authorize an issue of city bonds to the Milwaukee and Superior Railroad Company," the mayor and clerk of said city were authorized and directed to issue and deliver to said company the one hundred thousand dollars of city bonds mentioned in said bill, for the purpose and upon the conditions specified in said ordinance; that is to say, upon the same conditions specified as aforesaid in said report of said committee.

And further answering, this defendant saith that on or about ——, 1857, this defendant, by its proper officers, duly executed and delivered to said defendant, the said company, its corporate city bonds to the number of one hundred, each for the sum one thousand dollars, making in the aggregate one hundred thousand dollars, dated Milwaukee, January 1, 1857, or thereabouts, and payable 20 years after that date, with interest at 7 per cent. per annum, payable semi-annually at the Union Bank of New York, at the city of New York; that all the city bonds so issued to said company are still outstanding uncancelled and entirely unpaid, and in the possession of persons who are innocent purchasers thereof, for value, in good faith, some of whom are known and some are unknown to this defendant.

And further answering, this defendant says that the said fifty thousand dollars in notes and mortgages referred to in said complainants' bill, and described in the schedule hereto annexed, marked "A," are the identical notes and mortgages deposited by said company with this defendant
61 as part of the security for the loan of the credit or bonds of this city to said company as aforesaid, and that said notes and mortgages are still in the possession of this defendant or its treasurer for its sole use and benefit in the manner, upon the trusts, and for the purposes in this answer set forth, and no other.

And this defendant, further answering, saith that said one hundred thousand dollars of city bonds of said city, mentioned in said bill, were so issued and delivered to said company under and pursuant to said ordinance of said council and pursuant to certain acts of the legislature of the State of Wisconsin in such case made and provided, to wit, an act entitled "An act authorizing the city of Milwaukee to loan its credit in aid of certain railroads," approved April 2d, 1853; an act entitled "An act in addition to an act authorizing the city of Milwaukee to loan its credit in aid of certain railroads," approved July 12, 1853; an act entitled "An act to amend an act entitled an act authorizing the city of Milwaukee to loan its credit in aid of certain railroads and the acts amendatory thereof," approved March 31st, 1854; and an act entitled "an act to amend an act authorizing the city of Milwaukee to loan its credit in aid of certain railroads and the acts amendatory thereof, approved March 31, 1854," approved March 18, 1856, as well as the several acts conferring corporate powers upon said city; all which said several acts this defendant refers to and specially plead and sets up the same as authority for the issue of said city bonds, and claims the
62 benefit thereof as fully as though the same were herein set out in full.

And this defendant submits to the court whether said city bonds are not valid and binding upon said city.

And this defendant says, moreover, that the particular conditions of the said personal bond, (which was the bond of Conda R. Alton, Joshua Stark, and others, who were members of the board of directors of the said company,) given to the city pursuant to the requirements of the common council aforesaid, is, substantially, that said company or its board of directors should faithfully expend the proceeds of said city bonds in the construction and

equipment of that portion of said railroad between this city and a point twenty miles northward of the junction of their railroad with the La Crosse and Milwaukee railroad, and to construct, equip, and complete said railroad in good running order from the said junction northward a distance of not less than 20 miles by the first day of July, 1858, and to protect and save harmless said city against the payment of the interest or principal of the city bonds issued to said company till the said first 20 miles of said railroad shall be completed, fully equipped, and in full running order.

And this defendant further saith that by the terms of the acts authorizing the issue of said city bonds said company, defendant, was required to give to this city its corporate bond in the penal sum of $200,000, conditioned for the punctual payment and discharge of the principal and interest of said city bonds when due, and to indemnify the city against loss to arise from the issuing of the same, and as collateral security with that bond to mortgage to the treasurer of said city, for the use and benefit of the city, the first section of said company's, defendant, railroad next to Milwaukee
63 not less than 20 miles in length, with all its equipments, real estate, buildings, personal property, tolls, rents, income, franchises, and privileges, as well those thereafter to be acquired and constructed as those then already acquired and constructed, with covenants of warranty, and which mortgage should be a first lien on the whole property, except $10,000 per mile secured by a first and only prior mortgage on said company's road, property, and franchises, and to give any other and further security said council should require. And by said acts no city bonds could issue to said company till 10 miles of the road so to be mortgaged to the city had been completed, nor thereafter faster than the construction should progress, nor could, at any time, more than $5,000 per mile of that part of the road actually constructed be issued, unless other equivalent securities should be furnished therefor or in lieu thereof; and said notes and mortgages were so furnished and transferred to said city temporarily in lieu of such full security by mortgage on said road, and by agreement were, until such security by mortgage should be rendered complete under said acts, to be held substantially as security for the same things for which such bond and mortgage on the road was to be given by law.

And this defendant further saith that said company in constructing their said road commenced at said junction and proceeded northward, locating such junction as the starting point, and treating the part of their road next north of such junction as the first section thereof next to Milwaukee, as it in fact was, and mortgaged that 20 miles from said junction north,
64 and no other, to said city for the purpose of complying with said acts, and they have done no work in constructing their road except on such 20 miles, beginning at said junction and proceeding north as aforesaid.

And this defendant, further answering, saith that said company, defendant, hath failed to keep and fulfil the conditions upon which said city executed and delivered said city bonds to that company; that the condition of said personal bond hath been broken in each and every particular thereof; that neither the obligors therein nor said company, defendant, (as this defendant is informed and believes,) ever expended the proceeds of said city bonds faithfully in the manner and for the purpose in said condition of said personal bond written as aforesaid; that neither said obligors nor said company, defendant, ever constructed, equipped, and completed said railroad in good running order from said junction with the La Crosse and Milwaukee railroad northward a distance of 20 miles by the first day of July, 1858, nor have they ever to this time completed the same or any part thereof, nor have they paid the accruing interest on said city bonds or any part thereof,

but the same remains entirely unpaid, and thereby said city hath suffered a great loss and damage, to wit, to the amount of fifty thousand dollars.

And this defendant still further saith, on information and belief, that said company long before the commencement of this suit became insolvent and voluntarily dissolved and abandoned the work and trust for which it
65 was organized and created; that the first mortgage given by said company, defendant, upon all its property, real and personal, except said notes and mortgages, and upon all and singular its rights, privileges, and franchises has been foreclosed in equity, and under a decree of foreclosure and sale thereon rendered in this court all of said property and rights, liberties and franchises, &c., so mortgaged, have been long since and long before the commencement of this suit, and long before the rendition of this judgment in said bill of complaint mentioned, were sold and disposed of, and said company is and has been from that time for all practical purposes out of existence, and hath no power ever to comply with or fulfil the conditions of said personal bond, or to pay the principal or interest of said city bonds, or to preserve said city harmless thereunder.

And further answering, this defendant says that said company, defendant, in consideration of the issue of said city bonds, and indemnify said city against the same, and to secure the payment of said city bonds, principal and interest, transferred and delivered said, notes and mortgages to said city, and for the same purpose those notes and mortgages are still held by the city or by the treasurer of the city in trust for her use and for the benefit of the holders of said city bonds, as hereinafter set forth; that said city bonds were issued to said company defendant under and in pursuance of the various acts and ordinances above referred to; that this defendant cannot state how much or whether any of said company, defendants, was ever constructed when said city bonds were delivered to it, or how much have since been constructed, though this defendant avers that no part of it has
66 ever been completed, but they say that when said city bonds issued to that company as aforesaid, said company defendant furnished other equivalent security, to wit: said notes and mortgages and certain stocks of their company to the city in lieu of perfect security by mortgage on a portion of said road completed, as was primarily contemplated by the various acts aforesaid.

And further answering, this defendant says that after said city so executed and delivered to said company, defendant, said city bonds the said company sold and transferred the same, (they being all made payable to bearer and negotiable,) and delivered the same for a valuable and for a full consideration to said company, defendant, paid therefor to sundry bona fide purchasers thereof; that all of said city bonds to the amount of $100,000 00, besides accrued interest, are now held and owned by parties who have purchased the same either immediately from the company or at second hand, deriving title from those who bought of the company, and paid very large sums therefor, in good faith, believing the same to be good and valid securities for the amounts therein respectively expressed; that said company, defendant, derived from the sale of said city bonds a very large amount of money, to wit: the amount of $75,000 or more; that among others one August Van Glaber has became the purchaser of and is now the owner and holder of six of said city bonds for the principal sum of one thousand dollars each, for which he paid, as this defendant is informed and believes, a very
67 large sum of money, to wit, six thousand dollars or thereabouts; that the purchasers were induced to buy said bonds and pay therefor in great part by the fact that the notes and mortgages mentioned in said bill, and hereinbefore mentioned, had been transferred to and were then held by the said city as a better security for the payment of the same, with the bond

or guaranty of said company, defendant, for the payment thereof respectively as they should fall due; that, as this defendant is informed, advised, and believes, this defendant stands to the several holders of said city bonds in the relation of trustee to *cestui que* trust in relation to said notes and mortgages which were transferred to it as security as aforesaid; that, as this defendant is advised and believes, it cannot surrender said notes and mortgages to said complainant, or to said company, or to any other person whomsoever, without the assent thereto of said holders and owners of said city bonds, but that they are under obligation to hold the same for the benefit of said holders of city bonds as security for the payment of the same; that since default has happened in the payment of interest on said city bonds the holders thereof have the right in equity to maintain a bill or suit in any court of competent jurisdiction to subject said notes and mortgages to the payment of the amount due to them respectively upon their said city bonds, and these defendants submit that neither in this suit nor in any suit or proceeding can the court grant the relief prayed for in said bill of
68 complaint, or put said notes and mortgages in the hands of a receiver, or dispose of them in any way without first causing said several holders of city bonds, so far as they can be found, to be brought in as parties, and this defendant insists that no further proceedings be taken in this suit until said holders of said city bonds be made parties hereto.

And this defendant further says that it holds title to said notes and mortgages as a bona fide purchaser of the same before due for a valuable consideration actually paid therefor, without any notice of any defect therein or any defence, legal or equitable, thereto, and they have only recently been informed that said notes and mortgages are subject to some doubt as to their validity; but this defendant is now advised and believes that said notes and mortgages were procured to be executed and given by the makers thereof by gross fraud on them practiced by said company and its officers, directors, and agents, and that by reason of such frauds and fraudulent representations said notes and mortgages would be voidable and subject to a good defence by the makers in the hands of said company, or its directors, or agents, or any one in privity with them or having notice of such fraud; and this defendant insists that the court should not cause the same to be transferred to other bona fide purchasers without first making the makers parties to the proceedings herein.

And further answering, this defendant says it is not indebted to said company nor has it possession of any money, or any property, things
69 in action, or effects of any kind belonging to said company, or in which said company hath any interest, except said notes and mortgages.

And further answering, this defendant saith that said city issued her said bonds upon the express promise and understanding of said company, defendant, to pay the principal and interest thereof as the same should fall due; that in contemplation of the acts authorizing the issue of said city bonds to said company was but a loan of credit by the city, and as between the company and the city the company was to be and is primarily liable to pay the same, principal and interest, as it falls due, and the city (as between them) was to stand and does stand in the relation of endorser or surety for the accommodation of said company. And this defendant denies all unlawful confederacy and conspiracy in the premises, and that any of the matters in said bill contained, not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, are true to the knowledge or belief of this defendant.

And this defendant demands that said bill of complaint be dismissed, and

that it may have and receive its reasonable costs and charges in this behalf most wrongfully sustained.

JOSHUA LA DUE,
City Attorney for City of Milwaukee.

O. H. WALDO, *of Counsel.*

70 DISTRICT OF WISCONSIN, *ss:*

On this first day of April, A. D. 1861, before me came Joshua La Due, who signed the foregoing answer, and, being duly sworn, says on oath that he is city attorney of the city of Milwaukee, that he has read the said answer by him signed, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

J. M. MILLER, *Clerk.*

And afterwards, to wit, on the seventeenth day of May, 1861, came the parties, by their counsel, and the demurrer of the defendants, James B. Cross, James Ludington, and Samuel B. Scott, having been argued, it is thereupon ordered by the court that the said demurrer be, and hereby is, overruled, and that the said defendants file their answer to this bill by the first Monday of of July next.

And afterwards, to wit, on the sixth day of July, 1861, came the defendants, James B. Cross, James Ludington, and Samuel B. Scott, by their solicitors, and filed their answer as follows, to wit:

72 *Answer of def'ts, Cross, Ludington, and Scott.*

District court of the United States, district of Wisconsin.

G. P. DRURY AND WILLIAM PAGE
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, THE city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

The joint and several answer of James B. Cross, James Ludington, and Samuel B. Scott to the bill of complaint of G. P. Drury and William Page, against the said Cross, Ludington, and Scott, impleaded with the Milwaukee and Superior Railroad Company and the city of Milwaukee, defendants.

These defendants, saving and reserving unto themselves all benefit and advantage of exception to the many errors and imperfections in the said bill of complaint contained, for answer thereunto, or unto so much thereof as they are advised it is material or necessary for them to make answer unto, answering, say that as to all and singular the matters and things in the said bill of complaint contained and alleged, except those having reference to the purchase by these defendants of the several judgments against said railroad company and the said Button, Haertel, Hull, and Alton, and of said railroad bonds and of the purchase by these defendants under the foreclosure of said railroad mortgage, these defendants are strangers, having no knowledge thereof, and they leave the complainants to their proofs in that regard. And these defendants, further answering, say that the allegations in the bill of complaint contained concerning the purchase by these
73 defendants of the judgments against said railroad company, (said railroad mortgage bonds,) and the subsequent purchase by these defendants, under the foreclosure of said railroad mortgage, of the railroad and

property mentioned in the mortgage, are for the most part untrue; that the real truth and fact is as follows: Some time in the month of May, 1859, these defendants were informed of the existence of the judgment of J. Boorman Johnston & Co. against the railroad company and of the several judgments against Haertel, Hull, Button, and Alton as endorsers, amounting in the aggregate to about the sum of twenty-three thousand dollars, including interest and costs, and that said Johnston & Co. held as collateral security three hundred and twenty-two of the first mortgage bonds of said railroad company. They were also informed that said Johnston & Co. were willing to sell said judgment at a discount and to assign as an incident said collateral securities; that said Johnston & Co. were induced to make a discount on said judgments by reason of the doubtful pecuniary responsibility of said endorsers, the probable insolvency of said railroad company, and their disinclination to become the purchasers, as they would probably be compelled to do in order to secure themselves in whole or in part of the mortgaged premises and property on foreclosure. The said railroad mortgage was then in process of foreclosure, a decree of foreclosure and sale having been entered therein in this honorable court in the month of March preceding, with an order of reference to a master to ascertain the number and amounts of bonds outstanding, and the names and titles of the holders thereof. These defendants were induced to believe
74 that some profit might be made in a purchase of such judgments, with said bonds as collateral, and they set about negotiating therefor on their own sole account and as a mere adventure of profit and speculation in good faith as they would have embarked in any other business transaction. They They were not informed of, nor did they hear suggested any doubt about the title of Johnston & Co. to all the bonds they proposed to assign; and these defendants were induced to believe that said Johnston & Co.'s title was good and had been acquired in the utmost good faith, nor have they since been informed of anything to the contrary; and upon their information and belief they deny all the allegations, intimations, suggestions, and innuendos to the contrary in the said bill of complaint contained.

After some considerable negotiation between these defendants and said Johnston & Co., and during which these defendants had taken legal advice as to the validity and finality of said judgments and the title of said Johnston & Co. to said bonds, and being favorably advised thereto, these defendants became the purchasers of the judgments and took an assignment thereof with said three hundred and twenty-two bonds, paying therefor near the sum of fourteen thousand dollars in cash; that they did so without any understanding or agreement with said railroad company, its officers or agents, or with said Haertel, Button, Alton, or Hall, as to a discharge of said judgments, but in regard thereto they stood precisely as said Johnston & Co. had theretofore stood. After these defendants had become the owner of said judgments, and had received an assignment of said three hundred and twenty-two bonds, it was suggested to these defendants by their
75 legal counsel that it would be profitable for them if possible to become the absolute owners of the said bonds. They were not then, in view of the other two hundred and twenty-eight bonds outstanding, the value of the mortgaged property, and of the suit pending by the Boston Locomotive Works hereinafter mentioned, considered worth nearly so much as the aggregate amount of said judgments, nor indeed so much as these defendants had paid for said judgments; and it seemed apparent that these defendants could only make themselves whole by careful and prudent management and by being placed in a position where they could control and manage the subject so far as said three hundred and twenty-two bonds were concerned as their own. That these defendants accordingly made a proposi-

tion in writing to said railroad company to purchase said bonds absolutely, offering as a consideration to discharge said judgment, or if the company preferred to submit the question of value of said bonds to the test of a public sale, the defendants were willing, if allowed, to become bidders, and would bid an amount equal to the judgments, which latter alternative was accepted by the company. And these defendants say that the said proposition originated with these defendants, was made by them in good faith, without any intention or thoughts of wrong or fraud, and they utterly deny every allegation or imputation in that behalf in the bill of complaint contained. Said bonds were accordingly advertised for sale at the Chamber of Commerce, in Milwaukee, as the most public and advantageous place of sale, and
76 notice of such intended sale was published for about one week daily in the Milwaukee Daily News, and appeared in a conspicuous column, the same in which new advertisements and special notices usually appear. Defendants had no intention or wish to conceal the sale, but, on the contrary, would have gladly permitted the bonds to be sold at a percentage which would have netted the amount of said judgments. The hour of 12½ o'clock was selected as the one when business men were on 'change. At the time and place of such sale, there where present, as defendants believe, at least one hundred of the prominent business men of the city; and the counsel of defendants was permitted by the president of the chamber to state the facts of the sale, its object, and nature, which he did publicly, and fully explained the circumstances under which such sale was made, as indeed every fact, defendants believe, which could have any influence in determining or bearing upon the question of value of said bonds. These defendants became the purchasers of said bonds at said sale, and thereafter, in accordance with the terms of their said proposition, they discharged said judgments.

Afterwards at the sale of the mortgaged property under the decree of foreclosure these defendants became the purchasers for the sum of twenty thousand one hundred dollars, which was paid into court, and that they afterwards as the owners of said bonds became entitled by the order of the court to the sum of ———, as will appear of record. These defendants further say that in addition to the sum paid by them for said judgments
77 they expended in the purchase of claims against said company, and in the costs and expenses of protecting their rights in the premises, and in the costs and expenses of divers lawsuits and proceedings subsequent to said foreclosure sale and in reducing the mortgaged property to possession, the aggregate sum of near —— thousand dollars, so that in fact they have been compelled in the end to pay nearly if not quite the full actual value of all the tangible property they acquired under said foreclosure, and which they hoped might prove a profitable adventure, has in fact proved otherwise; though these defendants submit that it is no concern of the complainants whether these defendants have become enriched or impoverished by such adventure. And these defendants, further answering, say that at the time these defendants made the purchase of said judgments and bonds, there was, as they are informed and believe, pending in the circuit court of Milwaukee County, a suit to recover from said railroad company the two locomotives mentioned in the bill of complaint, in specie, based on some allegations of fraud on the part of said company in the purchase of said locomotives; that such suit continued in progress until some considerable period after the sale under said foreclosure, when it came on to be tried, when the plaintiff, the Boston Locomotive Works, suffered a nonsuit, and thereafter by some collusion, as defendants believe, between the complainants and some one of the officers of said railroad company, the judgment mentioned in the bill of complaint was confessed. In all the transac-
78 tions concerning these defendants' interests in the premises, the name

of the defendant James B. Cross was used for convenience, but for the joint benefit of these defendants. And these defendants utterly deny all and every allegation and suggestion of fraud as against them in the said bill of complaint contained, and they pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

J. B. CROSS.
JAMES LUDDINGTON.
S. B. SCOTT.

EMMONS, VAN DYKE & HAMILTON,
Def'ts' Solicitors.

DISTRICT OF WISCONSIN, *ss:*

On this fifth day of July, 1861, personally appeared before me James B. Cross, who, being by me duly sworn, deposed and said that he had read the foregoing answer subscribed by him, and knew the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated on his information and belief, and that as to them he believed it to be true.

WINFIELD SMITH, *Master in Chancery.*

And afterwards, to wit, on the 2d day of September, 1861, came the complainants by their solicitors, and filed their replication to the answer of the city of Milwaukee, and also filed exceptions to the answer of James B. Cross, Ludington, and Scott, as follows, to wit:

79 *Replication to answer of the city of Milwaukee.*

In U. S. district court for district of Wisconsin.

G. P. DRURY AND WM. PAGE, ASSIGNEES, &C.,
ag'st
THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY,
the city of Milwaukee, *et al.*

The replication of the complainants to separate answer of the defendant the city of Milwaukee to the bill of complaint of the complainants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the many insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that said answer of said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true.

All of which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray,
80 as in and by their said bill they have already prayed.

PRICHARD & JACKSON,
Solicitors for Complainants.

Filed Sept. 2, 1861.

81 *Exceptions to answer of Cross, Ludington & Scott.*

In U. S. district court for district of Wisconsin.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES OF BOSTON Locomotive Works,
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, THE city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

Exceptions taken by the complainants to the separate answer of the defendants James B. Cross, James Ludington, and Samuel B. Scott.

First exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether a judgment was not obtained by your orators against the said Milwaukee and Superior Railroad Company in the name of the said Boston Locomotive Works, plaintiff, at the time and in the manner and for the amount stated in their bill.

Second exception. For that the said defendants have not, to the best of their knowledge, information, remembrance, and belief, answered and set forth whether execution was not issued upon said judgment to the
82 marshal of the district of Wisconsin at the time and in the manner stated in said bill, commanding said marshal to collect and return the same as stated in said bill.

Third exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether said marshal did not, on or about the first Monday of December eighteen hundred and sixty, return said execution with his return endorsed thereon as stated in said bill.

Fourth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether there is not justly and equitably due on such judgment the amount stated in said bill.

Fifth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth what property and effects, real, personal, and mixed, equitable as well as legal, of every description, goods, chattels, money, book accounts, due bills, promissory notes, bonds, mortgages, judgments, contracts, leasehold interests, equitable interests in real estate, contracts in relation to real estate, stocks of any and what incorporated company or joint stock company, and choses in action and effects belonged to the said Milwaukee and Superior Railroad Company as well at the time of issuing said fieri facias as
83 at the time of filing said bill, whether standing in its name or in the name or in the hands of any other person or persons for its use or interest for it, either express or implied, and what disposition has been made of each of the same, and when and to whom and for what consideration, and how and when such consideration was paid fully and particularly, and the amount, condition, situation, and value of each of them, the names and places of residence of the debtors respectively, and the evidence of their indebtedness and how much is due on each of such demands, and which of them are good and collectable, and which of them are doubtful, and which of them are bad, and who has the possession, custody, or control of the said real estate, goods, and chattels, book accounts, due bills promissory notes, bonds, mortgages, judgments, and other choses in action and each of them.

Sixth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth

whether the said Milwaukee and Superior Railroad Company was not incorporated and organized as is set forth in said bill and for the purposes therein set forth.

Seventh exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether the said Milwaukee and Superior Railroad Company did
84 not resolve to and did not issue bonds for the purposes and of the amount stated in said bill.

Eighth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether the said Milwaukee and Superior Railroad Company did not execute five hundred and fifty bonds of one thousand dollars each, with interest coupons annexed, and did not execute and deliver to Farmers' Loan and Trust Company, of the city of New York, a mortgage or trust deed for the purpose of securing the payment of said bonds on the property of said railroad company as stated in said bill.

Ninth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether said Milwaukee and Superior Railroad Company did not, on or about the fourth day of December, A. D. 1856, enter into a contract with Bailey Brothers & Co., of Liverpool, England, for the purchase of four thousand tons of iron rails for the track of said company, for the purchase price of which said railroad company agreed to give the notes of said railroad company, due in six, nine, and twelve months from the delivery in New York, with interest added, and endorsed by C. R. Alton, H. Hautel, Edward Button, and D. P. Hull, or others in responsibility satisfactory to C. B. Raymond & Co., of New York, and that with said notes should be lodged first mortgage eight per cent. bonds of said railroad company at fifty per cent.,
85 or two dollars of bonds for one of notes.

Tenth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether the business of said railroad company was not managed and controlled by a board of directors, consisting of seven persons, a majority of whom constituted a quorum and were authorized to transact the business of said company, and whether the said Alton, Button, Hautel, and Hull were not each and every of them members of such board of directors of said railroad company at the time said contract was made by said railroad company with said Bailey Brothers & Co., and also whether the said Hautel, Button and Hull did not continue to be members of said board until after a sale of the property of said company on a pretended foreclosure of a mortgage on the road and property of said company.

Eleventh exception. For that the said defendants have not, to the best of their knowledge, remembrance, and belief, answered and set forth whether the said Alton, Hautel, Button, and Hull did not assent to the making of said contract for iron and the terms and conditions thereof; whether the said railroad company did not during the spring and summer of 1857, receive of said Bailey Brothers & Co. a large quantity of iron in pursuance with said contract, amounting in value to between sixty and seventy thousand dollars, for which said railroad company gave its notes due in six, nine, and twelve months from date; whether said notes were not, and each and every
86 of them, endorsed by the said Alton, Hautel, Button, and Hull, and also whether the said railroad company did not lodge in the hands of C. B. Raymond & Co., as agent of said Baily Brothers & Co., an amount of the first mortgage bonds of said railroad company equal, at their par value, to double the amount of said notes, and as to the terms and conditions of said contract with said Bailey Brothers & Co., the quantity of iron received

in pursuance with said contract, the respective dates and amounts of each of the notes given by said railroad company for such iron, and which of them were endorsed by said Alton, Hautel, Button, and Hull, or either of them, and the number and amount of each and every first mortgage bonds of said railroad company deposited with said C. B. Raymond & Co. as collateral to said notes.

Twelfth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether the said Milwaukee and Superior Railroad Company did, in the year 1857, and at what time, suspend the construction of its said railroad; whether the said railroad company had been or was, at the time it suspended the construction of its said road, able to pay the notes it had given Bailey Brothers & Co., for iron rails; whether said railroad company did with the assent of said Alton, Hull, Hautel, and Button, return to said C. B. Raymond & Co., as agents of Bailey Brothers & Co., all of the iron rails which
87 had not been laid on the road of said company; whether the said C. B. Raymond & Co., as agents of said Bailey Brothers & Co., did not, in consideration of the return of such iron, surrender to said railroad company the notes given for such iron so returned, and also surrender and deliver up to said company a proportional amount of said first mortgage bonds as collaterals; whether the said C. B. Raymond & Co. did not, as such agents, extend the time for the payment of the notes still held by said Bailey Brothers & Co., and unpaid, six months from the date of their maturity upon the security before given, to wit, the endorsement of Alton, Hautel, Button & Hull, and an amount of the first mortgage bonds of said company equal at their par value to double the amount of said notes; also as to what amount of railroad iron was returned by said company to said C. B. Raymond & Co. as such agents, how much iron had been laid on the track of said road, what notes were surrendered by said C. B. Raymond & Co., and the amount thereof, and the number and amount of the first mortgage bonds respectively surrendered by said C. B. Raymond & Co., as such agent, to said railroad company; also the amount of the notes returned by said C. B. Raymond & Co., as such agent, the amount of each and by whom endorsed, and the number and amount of the bonds respectively returned by said C. B. Raymond & Co. as collateral security for said notes.

Thirteenth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether at the time the said iron was returned to said C. B. Raymond & Co., as such agents, the said Milwaukee and Superior Railroad
88 Company was not wholly insolvent; whether it resumed the construction of the said road; whether it has paid its liabilities, and whether the said directors, Alton, Hautel, Button, and Hull did not at the time said iron was returned to said C. B. Raymond & Co., know that the said railroad company was wholly insolvent, and also whether said railroad company ever executed any other bonds secured by said mortgage except the said five hundred and fifty.

Fourteenth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether at the time the first of the extended notes of said railroad company became due, said five hundred and fifty bonds were not held and disposed of as follows: forty-two of said bonds by C. B. Raymond &
89 Co. as such agents as collateral to said extended notes of said company; one hundred and twenty-eight of said bonds held by the city of Milwaukee as indemnity against loss by said city by reason of an alleged issue and loan of its corporate bonds to the amount of one hundred thousand dollars to said railroad company; one hundred of said bonds cancelled

by a resolution of the board of directors of said railroad company, and two hundred and eighty of said bonds placed in the hands of M. K. Jessup & Co., of the city of New York, and whether said two hundred and eighty of said bonds placed in the hands of M. K. Jessup & Co. were not so placed there in pursuance with a resolution of the board of directors of said railroad company to the effect and as set forth in said bill; also as to the number of each of said bonds and the resolutions and agreements in pursuance of which said bonds were so disposed of and held.

Fifteenth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether the said railroad company did not, in the month of December, A. D. 1856, make and enter into an agreement with the Boston Locomotive Works, of Boston, Mass., for the purchase of several locomotive engines and tenders on a credit of nine and twelve months from the date of delivery; whether the said Boston Locomotive Works did not, in pursuance with such agreement, in the year 1857, deliver to said railroad company two engines and tenders at the agreed price of nine thousand dollars each, and for which said railroad company gave its notes in pursuance with such agree-
90 ment; whether either or any part of said notes have been paid, and whether the judgment mentioned in said bill was not recovered upon said notes.

Sixteenth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether said railroad company did not, before it suspended the construction of its said track, lay and complete about five miles of its road and put thereon said two engines and tenders, and ten platform cars, and whether said platform cars were not purchased by said company at a cost of about six thousand dollars.

Seventeenth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether said extended notes were paid when they became due; whether said Bailey Brothers & Co. did not, about the month of May or some other time in the month of May, 1858, and at what time commence an action against said endorsers on said notes in the district court of the United States for the district of Wisconsin; whether while said action was pending against said endorsers the said endorsers did not apply to James Bowman Johnson & Co., who had become the agent of Bailey Brothers & Co.,
91 and request said James Bowman Johnson & Co., as such agents, to cause said mortgage or trust deed to be foreclosed, and whether said Johnson & Co. did not refuse to cause said mortgage to be foreclosed.

Eighteenth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether said endorsers on said notes were not still directors of said railroad company; whether said endorsers and directors, after said action had been commenced against them, did not apply to said Farmers' Loan and Trust Company, the trustee named in said mortgage or trust deed, and make an arrangement with said Farmers' Loan and Trust Company, with the consent of said Johnson & Co.; that a suit for the foreclosure of said mortgage should be commenced and prosecuted at the risk, and in case of failure at the expense, of said endorsers; that said suit should be conducted nominally by the attorneys of said Johnson & Co., but in fact by the attorney of said railroad company under the direction of said endorsers and directors.

Nineteenth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether on action was not commenced in the said district court
92 for the district of Wisconsin, in the month of December, 1858, for

the foreclosure of said mortgage, in which said Farmers' Loan and Trust Company were named as complainants, purporting to be for the benefit of the holders of the bonds secured by said mortgage; whether in truth and in fact said action was not commenced and conducted at the sole instance and request and for the benefit of said endorsers, and at their risk and expense in case of failure; whether said suit was not conducted nominally in the name of the attorney of said Johnson & Co. but in fact by the attorney of said railroad company with the assistance of its officers; whether the subpœna in said suit was not served on the secretary of said railroad company only; whether the secretary of said company was not also its attorney; whether any defence was interposed by said railroad company to said action; whether the board of directors or any of the officers of said company took any action to defeat said suit or advise the shareholders or creditors of said railroad company that said suit was pending, and whether every effort was not made by said endorsers and directors to facilitate the proceedings in said suit, and to secure the full and complete discharge from their liabilities on said notes regardless of the rights and interests of the bona fide creditors of said railroad company; whether said arrangement was made with said Johnson & Co., in pursuance with a resolution of the board of di-
93 rectors of said railroad company, or how otherwise; whether all, or which of said endorsers and directors presented said resolution or completed said arrangements; the names of the attorneys of said Johnson & Co.; the time when said suit was commenced, and the name or names of the person or persons who prepared the bill in said suit for the foreclosure of said mortgage; the name or names of the person or persons performing all of the services in said suit, and by whom they were paid for said services.

Twentieth exception. For that the said defendants have not, to the best of their knowledge, rememberance, information, and belief, answered and set forth whether the said endorsers and directors did not, after said foreclosure suit was commenced, and while the same was pending, procure to be passed by the board of directors of said railroad company a resolution on or about the third of March, A. D. 1859, without the request of said Johnson & Co., or without any consideration moving to them from said Johnson & Co., and without the knowledge of said Johnson & Co., directing that the said two hundred and eighty bonds deposited with M. K. Jessup & Co. should be transferred and delivered by said M. K. Jessup & Co. to said Johnson & Co., as agents of said Bailey Brothers & Co., as additional security for said in-
94 debtedness of said railroad company, for which said endorsers were liable, provided said Johnson & Co. should give their assent thereto. Whether said first mortgage bonds were not delivered by said M. K. Jessup & Co. to said Johnson & Co., and received by said Johnson & Co. on or about the first of May, 1859. Whether said transfer and delivery was not voluntarily made by said board of directors without any consideration, and whether the said railroad company received any benefit or advantage, and what, for such transfer; when said resolution of said board of directors was passed, and whether said directors were all present, or which of them were present and voting, and whether said endorsers voted for or against said resolution.

Twenty-first exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether said endorsers and directors did not after said foreclosure suit was commenced make an effort to find some person who would purchase of said Johnson & Co., as such agents, the notes held by said Johnson & Co. against said railroad company and said endorsers, and release said endorsers from all liabilities on said notes; whether one of

the purposes of said endorsers in making said transfer of said two hundred and eighty bonds to said Johnson & Co., was not for the purpose of inducing some person to purchase said notes and discharge said endorsers from their liabilities thereon; whether it was not also one of the pur-
95 poses of said endorsers in delivering to said Johnson & Co. said two hundred and eighty bonds, that in case the money arising from the sale of the property described in said mortgage under the decree which would be rendered in said foreclosure suit should be insufficient to pay the face of said bonds, and that such money should be equally divided among the holders of the bonds of said company, said Johnson & Co. would receive in virtue of said three hundred and twenty-two bonds, which they then held, a sufficient sum to pay and satisfy said notes, and thus discharge said endorsers from their liabilities on said notes.

Twenty-second exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answer and set forth whether the said endorsers and directors did not before said two hundred and eighty bonds were delivered to said Johnson & Co. enter into negotiations with James B. Cross, James Ludington, and Samuel B. Scott, for the purchase by said Cross, Ludington and Scott of the said Johnson & Co., as such agents, of said claims against said railroad company and said endorsers and directors; whether afterwards an arangement and agreement was not entered into by said endorsers and directors and said Cross, Ludington and Scott that said endorses should secure to said Cross, Ludington and Scott an absolute ownership of said mortgaged premises, and in order to do so should perfect the title of said Cross, Ludington and
96 Scott to all of said first mortgaged bonds held by said Johnson & Co. as collateral to said notes, and that in consideration thereof they, the said Cross, Ludington and Scott, should purchase said notes of said Johnson & Co., and release and discharge said endorsers from all liability thereon, or a similar arrangement or agreement, and what, and whether all or which of said endorsers made such arrangement and agreement, and at what time the same was made.

Twenty-third exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether the said Cross, Ludington and Scott did not in pursuance with said agreement, and about the first of May, 1859, purchase and receive from said Johnson & Co., as such agents, all of said notes against said railroad company and said endorsers, together with said three hundred and twenty-two bonds; whether said notes were not in judgment as against said endorsers at the time of such assignment by said Johnson & Co. to said Cross, Ludington and Scott; whether said claims did not amount to less than twenty-three thousand dollars; whether the said Cross, Ludington & Scott did not purchase all of said claims, and said three hundred and twenty-two bonds for the sum of about fourteen thousand dollars; whether the said Cross, Ludington and Scott did not at the time said arrangement and
97 agreement was made with said directors and endorsers know and have knowledge of the placing of said bonds in the hands of M. K. Jessup & Co., and the trust and purposes for which they were so placed in the hands of said M. K. Jessup & Co; whether the said Cross, Ludington and Scott at that time did not have knowledge that the same had been transferred and delivered to said Johnson & Co., in pursuance with a resolution of said board of directors, that said endorses were members of said board of directors, and that such transfer was made in pursuance of a resolution of said board, and for the purpsse of protecting said endorsers and directors from their liability on said notes; whether the said negotiations with said Cross, Ludington and Scott was not carried out and completed by all or some of said endors-

ers, and who, on the part of said railroad company; and whether said Cross, Ludington and Scott did not at the time of such negotiations were commenced, carried on, and completed, have knowledge that said endorsers and directors were attempting to carry out and complete such negotiation and agreement with said Cross, Ludington and Scott, for the purpose of procuring their own discharge and release from their liabilities on said notes as endorsers.

Twenty-fourth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether the said Cross, Ludington and Scott, or James B. Cross, or
98 some other person, and who, for said Cross, Ludington and Scott, in pursuance with said agreement, on or about the 17th day of May, 1859, submit a written proposition to said board of directors, to purchase said three hundred and twenty-two bonds then held by said Cross, Ludington and Scott, or James B. Cross for said Cross, Ludington and Scott, and offering as a consideration for such purchase to discharge all of said claims upon said notes against said endorsers then being in judgment; whether said board of directors did not, in response to said proposition, on or about the said 17th day of May, 1859, pass a resolution authorizing the sale of said three hundred and twenty-two bonds at auction, on not less than five days' notice, on the condition that the said Cross, Ludington and Scott, or said James B. Cross, should bid thereon a sufficient sum to pay and discharge said claims against said endorsers; whether said bonds at that time had any market value; whether it was not well known by said board of directors and by said Cross, Ludington and Scott that said bonds had no market value; whether pledging so large an amount of said bonds for so small an indebtedness did not depreciate the market value of said bonds; whether said proposition was not made by said Cross, and said resolution passed by said board of directors in pursuance of some arrangement or understanding, and what, between said endorsers and said Cross, or Cross, Ludington and Scott, that said proposition should be so made
99 and said resolution passed, and whether said resolution of said board was not passed at the instance and request of said endorsers, who were members of said board of directors.

Twenty-fifth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether a notice did not appear in some paper printed and published in the city of Milwaukee, on or about the 20th of May, 1859, giving notice that three hundred and twenty-two of the bonds of said Milwaukee and Superior Railroad Company would be sold at auction on Saturday, the 28th day of May, 1859, at 12½ o'clock p. m., at the Chamber of Commerce; whether said notice was not printed in small type and inserted in an obscure corner of said paper; whether said notice was signed by any person or had any signature thereto, or any date; whether said notice was not drawn and caused to be so inserted in said paper by said endorsers or said Cross, Ludington & Scott, or one of them, and which; whether any other or different notice was given or published of such sale; why said sale was made at the hour of 12½ o'clock p. m.; whether said bonds were sold in pursuance of such notice to said James B. Cross, or Cross, Ludington & Scott, for the sum of seventy dollars for each bond of one thousand dollars; whether the said James B. Cross was not the only bidder at such sale, and whether the money arising from such sale of said three hundred and twenty-two bonds at seventy dollars each, was not about the sum due on said claims against said endorsers.

100 Twenty-sixth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief,

answered and set forth whether such of the claims against said endorsers as were not in judgment were not, on or about the 26th day of April, A. D. 1859, put in judgment by said Cross, Ludington & Scott, or some other person, and who, with the consent of said endorsers, and in some instances, and what, by confession of the said endorsers; whether the same were not so put in judgment in pursuance with an arrangement, agreement, or understanding between said endorsers and directors and said Cross, Ludington & Scott, or one, and which of them, did not cause said judgments on said claims to be satisfied and discharged of record, and whether the said Cross, Ludington & Scott do not now claim to own and hold said three hundred and twenty-two bonds in virtue of said pretended sale at auction; that the said bonds and the interest coupons annexed constituted a valid indebtedness in favor of said Cross, Ludington & Scott, and against said railroad company; whether there is not due on said bonds the sum of nearly four hundred thousand dollars, and whether the said Cross, Ludington & Scott do not claim that they should be paid out of the moneys arising from the sale of said property of said railroad company under the decree in said foreclosure suit, the full sum due on said bonds before any part thereof could be applied to the payment of the bona fide creditors of said company.

101 Twenty-seventh exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether the property and franchises of said railroad were not sold by the marshal of said district on or about the 27th day of August, 1859, under a decree rendered in said foreclosure suit; whether Cross, Ludington & Scott, or one of them, and which, for himself and the others were the only real bidders at such sale; whether they or one of them, and which, in behalf of themselves did not become the purchasers of said franchises and property at the sum of twenty thousand dollars or thereabouts; whether said Cross, Ludington & Scott were not the only pretended first mortgage bondholders, and whether said sum, after deducting the expenses of said trust company and the expenses of said foreclosure suit, was not returned to the said Cross, Ludington & Scott as the only first mortgage bondholders, also for what amount said property was struck off to said Cross, Ludington & Scott, or either, and which of them, and the amount of the expenses of said Farmers' Loan and Trust Company, and of foreclosing said mortgage, and the amount returned to said Cross, Ludington & Scott, after deducting such expenses.

Twenty-eighth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether at the time the said foreclosure suit was com-

102 menced the said Johnson & Co., as such agents, held more than the said forty-two bonds as collateral to said claims against said railroad company and said endorsers; whether said foreclosure suit was not commenced for the benefit of the actual holders of the outstanding first mortgage bonds of said company, and whether said two hundred and eighty bonds were not at the time of the commencement of said foreclosure suit, and did not for a long time and what time, thereafter remain in the hands of said M. K. Jessup & Co.

Twenty-ninth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, whether it was not in said foreclosure suit on or about the 19th day of March, 1859, refered to a master to take an account of the bonds that were in fact outstanding and of the number and holders of such bonds as is stated in said bill; whether said three hundred and twenty-two bonds were not presented before said master by James B. Cross, or some person for him, and by whom, as the absolute property of the said James Cross; whether said

railroad company did permit the same to be allowed without objection; whether said bonds were not so allowed with the full knowledge and permission of said endorsers and directors, and at their request; whether said bonds were not allowed for the purpose and with the intent to carry out and complete said arrangement and agreement between said Cross, Ludington & Scott and said endorsers and directors for the purpose of pro-
103 curing the discharge and release of said endorsers and directors.

Thirtieth exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether the said negotiations between the said Cross, Ludington & Scott, or one of them, and which, and said endorsers did not commence long before said decree was made in said fareclosure suit, and when; whether the said Cross, Ludington & Scott did not, long before they purchased said claims of said Johnson & Co., well know in what manner and upon what conditions said two hundred and eighty bonds were held by said M. K. Jessup & Co.; whether they did not also know by what means and for what purpose said bonds were taken from the possession of said Jessup & Co. and placed in the hand of said Johnson & Co.; whether they did not also well know that said railroad company was insolvent, and was indebted to the complainants or said Boston Locomotive Works for said locomotives engines.

Thirty-first exception. For that the said defendants have not, to the best of their knowledge, remembranc, information, and belief, answered and set forth whether the franchise of said railroad company, sold under the decree in said foreclosure suit, was not at the time of such sale worth between seventy-five and one hundred thousand dollars, or what sum; whether the said Cross, Ludington & Scott did not within a few weeks after such purchase by them of the property of said railroad company, and when,
104 sell said two locomotive engines and tenders, said ten platform cars and about five hundred tons of said railroad iron, and a quantity of railroad chairs and spikes and ties, taken from said railroad bed, for about the sum of forty thousand dollars, and what sum, which the said Cross, Ludington & Scott have actually received; whether the said James B. Cross, James Ludington, and Samuel B. Scott in all of said matters equally interested, when the name of only one of them was used in the various assignments, contracts, and agreements, made in carrying out such arrangement; whether the said Cross, Ludington & Scott do not claim to be the absolute owners of the moneys arising from the sale by them of said engines, cars, &c., and also of the remaining franchise of said railroad company, or how otherwise are the facts.

Thirty-second exception. For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth whether the said Cross, Ludington & Scott have not attempted to form some new or different organization or corporation to hold and manage the remaining property and franchise of said railroad company; whether said Cross, Ludington & Scott have not associated with them some other person or persons for the purpose of forming such organization or corporation, and constituting a board of directors, and the name or names of said person or persons; whether such person or persons have any actual interest in said property or franchises; if they have, whether the same was not re-
105 ceived by them from said Cross, Ludington & Scott, or one of them, or how otherwise, with the full knowledge of the manner in, and conditions upon which the said Cross, Ludington & Scott, received the same, and whether the said Cross, Ludington & Scott have not in fact, or claim, the sole and exclusive control and ownership of said property and franchises.

In all which particulars the said joint and several answers of the said defendants, James B. Cross, James Ludington, and Samuel B. Scott, is imperfect, insufficient, and evasive, and the complainants therefore except thereto and pray that the said defendants, James B. Cross, James Ludington, and Samuel B. Scott, may put in a further and better answer to said bill of complaint.

PRITCHARD & JACKSON,
Solicitors for Complainants.

JAMES H. KNOWLTON, *of Counsel.*

Argument of exceptions to answer and decision.

And afterwards, to wit, on the sixth day of January, 1862, came the parties by their counsel, and the exceptions to the answer of James B. Cross, James Ludington, and Samuel B. Scott having been submitted without argument, on consideration whereof it is ordered by the court that the said exceptions be, and hereby are, overruled.

And afterwards, to wit, on the 3d day of February, A. D. 1862, came the complainants, by their solicitors, and filed their replication to the answer of Cross, Ludington, and Scott, as follows:

106 *Replication to answer of Cross, Ludington, and Scott.*

In U. S. district court for district of Wisconsin.

G. P. DRURY AND WM. PAGE, ASSIGNEES OF BOSTON Locomotive Works,
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

The replication of the complainants to the separate answer of James B. Cross, James Ludington, and Samuel B. Scott, defendants.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiences of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or anything whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed, and avoided, traversed or
107 denied, is true. All of which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and pray as in and by their said bill they have already prayed.

PRICHARD & JACKSON,
Sols. for Compl'ts.

JAMES H. KNOWLTON and
MAT. H. CARPENTER, *of Counsel.*

108 *Docket entries.*

District court of the United States of America for district of Wisconsin.

Pleas before the Honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES OF THE Boston Locomotive Works,
vs.
MILWAUKEE AND SUPERIOR RAILROAD COMPANY, THE City of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

Chan. L., page 440.

JANUARY 14, 1861.

This day came the complainants, by their solicitors, Messrs. Prichard & Jackson, and filed their bill of complaint against these defendants, and entered in the Order and Rule Book an order that they show cause by Monday the 21st day of January inst., at 10 o'clock in the forenoon, why an injunction should not be issued and a receiver be appointed, according to the prayer of the bill on file. Whereupon a subpœna issued, returnable the first Monday of February next.

Return.

Subpœna returned, served on the within-named Milwaukee and Superior Railroad Company, by delivering a copy of this subpœna, personally, to H. Haertel, one of the directers of said company, and by leaving a copy of this subpœna at the usual place of abode of Joshua Stark, president of said company. Served upon the within-named the city of Milwaukee, by
109 delivering a copy of this subpœna, personally, to Francis Huebschman, acting mayor, and copy to George G. Dousman, clerk of said city. Served on the within-named James B. Cross, James Ludington, and Samuel B. Scott, by delivering a copy of this subpœna, personally, to each of them this 14th day of January, 1861.

J. H. LEWIS, *Marshal.*

Fees, $16 98.

JANUARY 21, 1861.

This day came the defendants James B. Cross, James Ludington, and Samuel B. Scott, by their counsel, and on their motion it is ordered by the court that the hearing of the rule for an injunction be, and hereby is, extended to the first Monday of February next.

Rule to plead.

FEBRUARY 4, 1861.

"On motion of Prichard and Jackson, complainants' solicitors, it is ordered that the said defendants, and each of them, appear and plead answer or demur to the complainants' bill on file by the 1st Monday of March next, or said bill will be taken as confessed."

Demurrer.

FEBRUARY 28, 1861.

This day came the defendants James B. Cross, James Ludington, and Samuel B. Scott, by their solicitors, Messrs. Emmons, Van Dyke & Hamilton, and filed their demurrer.

Answer of city.

APRIL 1, 1861.

This day came the defendant the city of Milwaukee, by its attorney, Mr. La Due, and filed its answer.

110 MAY 17, 1861.

This day came the parties, by their counsel, and the demurrer of the defendants James B. Cross, James Ludington, and Samuel B. Scott having been argued, it is thereupon ordered by the court that the said demurrer be and hereby is overruled, and that the said defendants file their answer to this bill by the first Monday of July next.

Answer.

JULY 6, 1861.

This day came the defendants James B. Cross, James Ludington, and Samuel B. Scott, by their solicitors, and filed their answer.

Replication and exceptions.

SEPTEMBER 2, 1861.

This day came the complainants, by their solicitors, and filed their replication to the answer of the city of Milwaukee, and also filed exceptions to the answer of James B. Cross, Ludington, and Scott.

JANUARY 6, 1862.

This day came the parties, by their counsel, and *and* the exceptions to the answer of James B. Cross, James Ludington, and Samuel B. Scott having been submitted without argument, on consideration whereof, it is ordered by the court that the said exceptions be, and hereby are, overruled.

Replication.

FEBRUARY 3, 1862.

This day came the complainants, by their solicitors, and filed their replication to the answer of Cross, Ludington, and Scott.

Rule for com'n.

APRIL 23, 1862.

This day came the complainants, by their solicitors, and entered in the Order and Rule Book a rule for a commission to issue to William Emerson, esq., of the city of New York, to take the testimony of James B. Johnston,
Adam Norrie, Charles H. Bergman, Isaac H. Knox, Gordon Norrie,
111 David D. Williamson, George F. Fetch, Morris K. Jessup, Curtis B. Raymond, John P. Kennedy, and John Lord, and also filed interrogatories to be annexed to said commission.

MAY 2, 1862.

This day came the complainants, by their solicitors, and entered in the Order and Rule Book a rule for a commission to issue to Robert D. Smith, esq., of Boston, Mass., to take the testimony of Holmes Hinkley and filed interrogatories to be annexed to said commission.

MAY 6, 1862.

This day came the the complainants, by their counsel, and on their motion and affidavit filed, it is ordered by the court that the time for taking testimony be, an hereby is, extended to the first day of July next.

MAY 20, 1862.

Commission issued to William Emerson, esq., of New York City, to take the depositions of James B. Johnston and others, and to Robert D. Smith, of Boston, Mass., to take the deposition of Holmes Hinkley.

JULY 10, 1862.

This day came the complainants, by their counsel, and on their motion and cause shown, it is ordered by the court that the time for taking testimony in this cause be, and hereby is, extended to the first day of October next.

JULY 29, 1862.

Depositions received from post office and filed.

OCTOBER 1, 1862.

Transferred to circuit court U. S., chancery, Docket A, page 146.

DISTRICT OF WISCONSIN, ss:

I certify that the above to be a correct copy of the record entries
112 in the above-entitled cause.

In testimony whereof, I have hereto set my hand and affixed the seal of said district court, this first day of October, A. D. 1862.

[SEAL.] J. M. MILLER, *Clerk.*

Circuit court of the United States of America for the district of Wisconsin.

Pleas before the circuit court of the United States for the district of Wisconsin.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES OF THE Boston Locomotive Works,
vs.
MILWAUKEE AND SUPERIOR RAILROAD COMPANY, THE CITY OF Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.
} Chan. A, page 146.

October 1, 1862. Transferred and continued from the district court of the United States. Chancery docket L, page 440.

October 7, 1862. This day came the complainants, by their counsel, and on their motion and cause shown, it is ordered by the court that the time for taking testimony on both sides in this case be extended until the first day of January next.

June 1, 1863. "On motion of Prichard & Jackson, solicitors for the complainants, ordered that this cause be, and hereby is, set down for hear-
113 ing on bill, answer, replication, and proofs, on 1st Monday of July, 1863."

September 10, 1863. Depositions received from F. Bloodgood, esq., and filed. And same day came John H. Lewis, late marshal, and made application to the court for leave to amend his return to the subpœna, which is granted, and return amended, as follows: "By leave of the court I hereby amend my return to this subpœna by leaving a copy thereof at the dwelling-house and usual place of abode of Joshua Stark, president of said company, with a free white person, a member of his family. J. H. Lewis, late marshal." And came the complainants, by their counsel, and on their motion it is ordered by the court that this bill be, and hereby is, taken as confessed against the defendant, Milwaukee and Superior Railroad Company, for its

having failed to plead answer or demur thereto. And this cause came on to be heard upon the bill taken as confessed against the Milwaukee and Superior Railroad Company, and between the complainants and the other defendants upon their pleadings and proofs—Messrs. Knowlton, Jackson & Carpenter appearing for complainants, and Mr. Emmons for said defendants—and the hearing not being concluded, the same was adjourned until to-morrow morning.

September 11, 1863. This day came the parties, by their counsel, and the hearing of this cause was resumed, and being concluded, the court took time to consider.

114 At a stated term of the circuit court of the United States of America, for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the sixth day) of July, A. D. 1863.

Present: The Honorable Andrew G. Miller, district judge, presiding.

On the twenty-sixth day of the said term, to wit, on the nineteenth day of September, A. D. 1863, the following proceedings were had, to wit:

Decree.

This day came the parties, by their counsel, and on consideration of the pleadings and proofs and of the arguments of counsel, it is ordered, adjudged, and decreed by the court that the complainants are equitably entitled to recover of the Milwaukee and Superior Railroad Company twenty-six thousand one hundred and forty-five dollars and eighteen cents, the amount of the debt, interest, and costs of the judgment set forth in their bill. And that the said complainants do have and recover of the said Milwaukee and Superior Railroad Company the said sum of twenty-six thousand one hundred and forty-five dollars and eighteen cents, together with their costs of this proceeding against said company to be taxed.

And it is further ordered, adjudged, and decreed by the court that the complainants' bill of complaint be, and hereby is, dismissed as to the
115 several defendants, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, and that these several defendants do recover of the complainants their costs to be taxed. Costs clerk $23 45.

A. G. MILLER.

Appeal.

September 21, 1863. This day came the complainants, by their counsel, and prayed an appeal to the Supreme Court of the United States. Whereupon it is ordered by the court that said appeal be, and hereby is, allowed upon said complainants' giving bond, with sureties to be approved by the court, in the penalty of two hundred and fifty dollars for the costs of said appeal.

October 5, 1863. Bond of A. A. Jackson and J. A. Noonan, in the sum of two hundred and fifty dollars, conditioned for the payment of the costs of this appeal. Approved by the district judge. Filed.

116 And afterwards, to wit, on the twenty-third of April, A. D. 1862, came the complainants, by their solicitors, and entered in the Order and Rule Book a rule for a commission to issue to William Emerson, esq., of the city of New York, to take the testimony of James B. Johnston, Adam Norrie, Charles H. Bergman, Isaac H. Knox, Gordon Norrie, Dowd D. Williamson, George F. Fitch, Morris K. Jessup, Curtis B. Raymond, John P. Kennedy, and John Lord, and also filed interrogatories to be annexed to said commission.

And afterwards, to wit, on the second day of May, 1862, came the complainants, by their solicitors, and entered in the Order and Rule Book a rule for a commission to issue to Robert D. Smith, esq., of Boston, Mass., to take the testimony of Holmes Hinckley, and filed interrogatories to be annexed to said commission.

And afterwards, to wit, on the sixth day of May, 1862, came the complainants, by their counsel, and on their motion and affidavit filed, it is ordered by the court that the time for taking testimony be, and hereby is, extended to the first day of July next.

And afterwards, to wit, on the twentieth day of May, A. D. 1862, commission issued to William Emmerson, esq., of New York City, to take the depositions of James B. Johnston, and others, and to Robert D. Smith, of Boston, Mass., to take the deposition of Holmes Hinckley.

117 And afterwards, to wit, on the 10th day of July, A. D. 1862, came the complainants, by their counsel, and on their motion and cause shown, it is ordered by the court that the time for taking testimony in this cause be, and hereby is, extended to the first day of October next.

And afterwards, to wit, on the twenty-ninth day of July, 1862, depositions were received from the post office and filed.

And afterwards, to wit, on the seventh day of October, 1862, came the complainants, by their counsel, and on their motion and cause shown, it is ordered by the court that the time for taking testimony on both sides in this case be extended until the first day of January next.

And afterwards, to wit, on the first day of June, 1863, came the complainants, by their solicitors, and entered in the Rule and Order Book a rule setting down the cause for hearing as follows, to wit:

Circuit court of the United States for district of Wisconsin.

G. P. Drury *et als.*
vs.
The Milwaukee and Superior Railroad Company and others. } In equity.

On motion of Prichard & Jackson, solicitors for the complainants, ordered that this cause be, and hereby is, set down for hearing on bill, answer,

118 replication, and proofs, on 1st Monday of July, A. D. 1863.

Dated June 1st, 1863.

Prichard & Jackson, Sol's for Compl't, by M. H. Carpenter, of Counsel.

And afterwards, to wit, on the tenth day of September, A. D. 1863, depositions were received from F. Bloodgood, esq., and were filed.

And afterwards, to wit, at a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the sixth day) of July, A. D. 1863—

Present: The Honorable Andrew G. Miller, district judge, presiding—

On the twenty-second day of the term, to wit, on the tenth day of September, A. D. 1863, the following proceedings were had, to wit:

G. P. Drury and William Page, assignees of the Boston Locomotive Works,
vs.
Milwaukee and Seperior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott. } In equity.

119 This day came John H. Lewis, late marshal, and made application to the court for leave to amend his return to the subpœna, which is

granted, and return amended, as follows: "By leave of the court I hereby amend my return to this subpœna, by leaving a copy thereof at the dwelling-house and usual place of abode of Joshua Stark, president of said company, with a free white person, a member of his family. J. H. Lewis, late marshal." And came the complainants, by their counsel, and on their motion it is ordered by the court that this bill be, and hereby is, taken as confessed against the defendant, Milwaukee and Superior Railroad Company, for its having failed to plead answer or demur thereto. And this cause came on to be heard upon the bill taken as confessed against the Milwaukee and Superior Railroad Company, and between the complainants and the other defendants upon their pleadings and proofs—Messrs. Knowlton, Jackson, and Carpenter appearing for complainants, and Mr. Emmons for said defendants—and the hearing not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the 11th day of September, 1863, came the parties, by their counsel, and the hearing of this cause was resumed.

And the complainants introduced and read the following depositions, to wit:

120 In the U. S. circuit court, district of Wisconsin.

G. P. Drury and William Page, assignees of the Boston Locomotive Works,
vs.
The Milwaukee and Superior Railroad Company *et alie.*

United States of America,
District of Wisconsin, ss:

To the judges of said court:

I, Francis Bloodgood, one of the masters and examiners in chancery, residing in the city of Milwaukee, respectfully report that on the 6th day of October, 1862, on motion of M. H. Carpenter, esq., of counsel for complainants, I made an order, fixing the 10th Oct., 1862, at 10 a. m. at my office, in said city of Milwaukee, to take the testimony of complainants' witnesses, which said order is annexed to the depositions of complainants' witnesses, this day filed in said court. Oct. 9th, 1862, the complainants appeared before said examiner at his said office, by M. H. Carpenter, esq., and J. H. Knowlton, esq., their counsel. The def'ts Scott, Ludington, and Cross, by N. J. Emmons, esq., their counsel, having by agree't between themselves determined to commence the examination on this day instead of that
121 fixed in the order. Deposition of Joshua Stark, taken on part of complainants, reduced to writing and subscribed by the witness. Deposition of N. J. Emmons commenced; adjourned to Oct. 10, 1862. Oct. 10, 1862, adjourned by consent of *of* parties to Jan'y 16, 1863. Jan'y 16, 1863, adjourned by consent of parties to Jan'y 17, 1863. Jan'y 17, 1863, complainants appeared by Mr. Jackson, their counsel; the def'ts Scott, Ludington, and Cross, by Mr. Emmons, their counsel, and the taking of the deposition of N. J. Emmons was resumed, and not being concluded, adjourned to Jan'y 18, 1863, at 11 a. m. January 18, 1863, adjourned by consent of parties to Jan'y 27, 1863, at 2½ p. m. Jan'y 27, 1863, at 2½ p. m., parties appeared as before, and by consent adjourned to February 3, 1863. February 3, 1863, parties appeared as before, and by consent adjourned to February 4, 1863, when the parties appeared as before, and by consent adjourned to February 5, 1863, when the parties appeared as before, and the depositions of James B. Cross, Cyrus F. Huritsman, and Herman Haertel were taken and subscribed, and again adjourned to Feb'y 6, 1863, at which time came the parties as aforesaid, and the deposition of Sam'l B. Scott was taken and

subscribed, and the deposition of N. J. Emmons was subscribed by him, and the examination adjourned to Feb'y 17, 1863, at 10 a. m., when the complainants appeared as before, pursuant to adjournment, and on motion of the complainants, adjourned to February 24, 1863. Feb'y 24, 1863, on
122 motion of examiner and by consent of parties adjourned to February 27, 1863. February 27, 1863, on motion of the complainants adjourned to March 3, 1863, at which time the parties came before the commissioner as before, and the deposition of Joshua Stark was resumed, and not being concluded, adjourned to March 4, 1863, at 10 a. m., at which time came the complainants as before, but none of the defendants appeared. The deposition of Joshua Stark was concluded and subscribed by him, and the deposition of Benj. R. Edgerton taken and subscribed. Exhibits F, G, H, and A introduced by complainants.

And I do further report that each of said witnesses examined were examined on behalf of the complainants; that they were each first duly sworn; that their depositions were reduced to writing, and were read over to and subscribed by each witness respectively, in the presence of the examiner; that the said depositions of the said witnesses have been this day filed with the court, and that attached thereto are all the exhibits introduced before the examiner. All of which is respectfully reported.

Witness my hand this 10th day of September, 1863.

FRANCIS BLOODGOOD,
Com'r and Examiner in Chancery.

United States circuit court, district of Wisconsin.

G. P. Drury and William Page, assignees of the Boston Locomotive Works.
123 *versus*
The Milwaukee and Superior Railroad Company *et als.*

On motion of M. H. Carpenter, esq., of counsel for the complainants, ordered that the time for the taking of the testimony of Joshua Stark, H. Hartel, D. P. Hull, N. J. Emmons, E. D. Holton, and George G. Dousman, as witnesses in the above-entitled cause on behalf of the said complainants, be, and the same is hereby, fixed for Friday, the 10 October inst., at 10 o'clock a. m. The taking of the depositions of said witnesses will be commenced at that hour, before the undersigned, at his office, in the city of Milwaukee.

It is further ordered that at least two days' notice of the time and place of such examination be given to the counsel or solicitors for the defendants.

Dated October 6, 1862.

FRANCIS BLOODGOOD,
Master in Chancery.

124 Circuit court, United States of America, district of Wisconsin.

George P. Drury and William Page, assignees of the Boston Locomotive Works,
versus
The Milwaukee and Superior Railroad Company, James B. Cross, James Ludington, Samuel B. Scott, and the city of Milwaukee.

United States of America,
District of Wisconsin, ss:

Deposition of Norman J. Emmons, a witness called and sworn on behalf of the complainants, before Francis Bloodgood, one of the examiners of the said court, at his office, in the city of Milwaukee.

October 9, 1862, at his office in said city, before the said examiner, came

the complainants, by M. H. Carpenter and J. H. Knowlton, esq'rs, their counsel, and the defendants James Cross, James Ludington, and Samuel B. Scott, by Norman J. Emmons, esquire, their counsel; and Norman J. Emmons being called as a witness on behalf of the complainants, and being first duly sworn by the examiner, did depose and testify as follows, to
125 wit:

Norman J. Emmons, being called as a witness on behalf of the complainants and instance, and first duly sworn by the examiner, did testify and depose as follows, in answer to oral interrogatories, put him by comp'ts.

Question. Were you acting as counsel for James B. Cross, whilst he was negotiating for the purchase of the notes and judgments of J. Boorman Johnson & Co., against the Milwaukee and Superior Railroad Company, and for the bonds (first mortgage bonds) of said company, which finally passed into the hands of said Cross, or said Cross and others, or were you in said negotiation counsel for Herman Haertel or for him and other directors of said railroad company?

Answer. I was not counsel for Mr. Cross, nor was I counsel for Mr. Haertel. I acted solely for J. Boorman Johnston & Co., and for the interest which they represented. I will add further, that when the negotiation first commenced, Mr. Scott, I think, on behalf of himself and Cross and Ludington, applied to me for information, and Mr. Scott, and, I think, also Mr. Ludington, asked me my opinion as lawyer, as to whether the purchase of the judgments and collaterals would be a safe business transaction. I gave them my opinion, at the same time telling them I was acting for the
126 sellers of the judgments, and that I preferred, if they had any doubts, that they should take other advice. I don't know whether they took other advice or not, except from what they told me. They said they were entirely willing to take my own opinion in the matter; they paid me nothing for my opinion; it was merely given them as a part of the duty I owed my clients, J. Boorman Johnston & Co.

(Obj'n. This testimony was taken subject to objection for irrelevancy and immateriality.)

Question. Was not that foreclosure suit prosecuted nominally by J. Boorman Johnston & Co., but really by Haertel or others, directors of said company.

Answer. It was really and actually prosecuted by J. Boorman Johnston & Co., or rather I should say by Mr. Williamson, the trustee in the mortgage, through their solicitors, but under circumstances like these. I think the first idea of foreclosing the mortgage came from me. Mr. Haertel, one of the endorsers, represented to me that he had no security nor indemnity f'r his endorsements, neither he or any of the other endorsers. I will state in advance that all the facts in this negotiation are stated in my correspondence with my clients, J. Boorman Johnston & Co., and I know speak
127 from recollection, and if it is deemed material I will produce such of those letters as bear upon this particular subject, or letter-press copies of my own letters. Mr. Haertel was anxious that I, instead of pursuing the endorsers, should seek to make my clients' money out of the collaterals which they held, by a foreclosure of the mortgage. J. Boorman Johnston & Co., I can only say generally, were averse to taking upon themselves the foreclosure of this mortgage, especially the expense of it. They expressed the desire rather to compromise their claims. On my part I advised and urged them to take upon themselves the foreclosure. My reason for it, as given to them, was the doubt in my mind of being able to collect these judgments out of the endorsers. Mr. Williamson would not authorize the foreclosure without indemnity against expenses, and required such

from J. Boorman Johnston & Co. J. Boorman Johnston & Co. on their part required indemnity, and they said that they thought the endorsers here, as the suit would really be for their benefit, should save them harmless from and pay the expenses of the foreclosure. Mr. Haertel was aware of the purport of the correspondence between me and J. Boorman Johnston & Co., and he undertook with me to pay the expenses of the foreclosure. J.
128 Boorman Johnston & Co. took my word and were satisfied, and I took Haertel's word and was satisfied, Williamson took Boorman Johnston & Co.'s word, and the foreclosure went on. In this forecloseure suit the cooperation of the city was solicited, and what it did in the premises is a matter of public record, I believe. I wish also further to add that at that time the idea of completing the road, and the whole adventure of the corporation was substantially abandoned.

Question. At this time, the time of the commencement of the foreclosure, how many bonds did J. Boorman, Johnston & Co. hold?

Answer. Forty-two certain, and I think they had theretofore rec'd the bonds held by M. K. Jessup & Co. A negotiation and correspondence for these bonds had been going on, but whether they had actually rec'd the bonds I cannot say. The documents attending their transfer will tell the date.

Question. At the time of the sale from J. Boorman Johnston & Co. to Cross, was Cross, Ludington, or Scott, def'ts, made aware of the correspondence between you and J. Boorman Johnston & Co., of which you have spoken?

Answer. They were very generally. I have no doubt I gave them so much of the substance of the correspondence as would truthfully an-
129 swer their inquiries for information. They were seeking to buy these judgments as a matter of speculation, and I believe I gave them all the information of which I was possessed.

Question. Did you communicate to them the substance of what you have heretofore stated of the correspondence between you and J. Boorman Johnston & Co.?

Answer. I can't say in how far I did or did not make direct reference to the correspondence. I was at the time merely acting for Johnston & Co., and as their attorney anxious to consummate the sale, and I went no farther, that I am aware of, in my communications, than as to such matters as I supposed the purchasers had a right to know, and I have now no reason to believe that I did not communicate everything to them, for I have not now, nor had I then, knowledge of any fact which I could wish to withhold.

Question. Did Cross, Ludington & Scott know that Haertel had agreed to indemnify and bear the expense of the foreclosure?

Answer. I only know from their own declarations made subsequently. They purchased pending the foreclosure and paid me for my services in and about the foreclosure. When they settled with me for such services
130 this question came up about Haertel's having agreed to indemnify J. Boorman Johnston & Co. against these expenses. Cross, Ludington & Scott denied any knowledge of such agreement.

(The complainants object to the last paragraph of the answer, as incompetent and not responsive.)

Question. State the substance of what you did communicate to Cross, Ludington & Scott in relation to Boorman Johnston & Co.'s claims, the collaterals held by them therefor, and the foreclosure suit pending ag'st the railroad co.

Answer. I can't undertake to give the words, but the substance was that the claims were in judgments and the judgments were final. My conversations were principally with Mr. Scott. That they probably knew as much as I did about the personal responsibility of the defendants. I think I told

the only hope of collecting the judgments was through the instrumentality of the railroad mortgage; that I thought that through that, if properly managed by men here on the spot, the whole amount of the judgments could be realized and that they could make a handsome profit on the sum for which Boorman Johnston & Co. were willing to take for the judgments. I
131 showed them all the resolutions which had been passed by the railroad co., and in general gave them all the facts within my knowledge having reference to Johnston & Co.'s title to the collaterals. I also gave them my opinion as a lawyer that such title was good, and that they would be perfectly safe in the purchase. At the same time, as I said before, I told them I prefered they should take disinterested advice. I have said heretofore that I did not know whether they did take other advice. On reflection I am mistaken. I know that they did advise with Mr. Butler. Mr. Butler came to my office, looked over the whole matter with me, and joined with me in my advice as to the safety of the transaction, and it was upon his advice that they acted.

(The last paragraph objected to as irrelevant and incompetent.)

In regard to what portion of the correspondence I communicated I have nothing further to add. I have stated it. I think, however, I read more of the correspondence to Butler than I did so Scott.

Question. Have you the original assignment from J. Boorman Johnston & Co.? and if so, will you produce it?

Ans'r. I have, and here produce it.

132 (By stipulation between the parties now made before the commissioner, a copy of it is to be made annexed to the deposition of the witness, marked "Exhibit E," and to be read in evidence with the same force and effect as the original.)

Question. Were you present at the time of the sale of these bonds in the Chamber of Commerce, Milwaukee.

Ans'r. I was.

Question. Did you then make a statement in relation to said bonds? and if so, state the substance thereof.

Answer. I stated the fact that the bonds had been lodged as collateral security to these judg'ts, and that they were sold with the consent of the corporation, and the sale was absolute. A number of questions were put to me by the bystanders, and in answer I have no doubt I stated I thought the purchaser would acquire a good title. These questions were put by the bystanders. The sale was on 'change during 'change hours.

Question. Did you not also state that the mortgage was being foreclosed and the sale being had to protect the rights of endorsers on railroad paper, or that they were to be protected in some way, or words to that effect?

133 Answer. I may have stated that the mortgage was being foreclosed. I don't think I made any reference to the endorsers. I have no recollection of their names being bro't in any way.

Question. Are you distinct in y'r recollection that you did not state this, or do you mean you are not certain whether you did or not?

Answer. I am not positive in my recollection that I did not, but am quite confident that I made no such statement.

Question. For whom were you acting in making this state't?

Answer. I was acting for Messrs. Cross, Ludington, and Scott, as I had been from the time they purchased the judg'ts; continued right along in the case after the transfer to them, they having retained me after the purchase to go on and act professionally in protecting their rights.

Question. Did you draw the proposition of J. B. Cross to become the absolute purchaser of the bonds, and did you draft the resolutions passed by the board of the directors of the co. on this proposition?

Ans'r. I did draw the proposition for Mr. Cross to sign; I did it at his request; it was, in fact, done under my advice as a lawyer; it was suggested by me. The resolutions, as passed, were, I think, prepared by myself; I prepared them at the request of Mr. Haertel, the president of the compa-
134 ny; I think I did; I have no doubt of it.

Question. Did you, from the time of the ass'g'nt of J. Boorman Johnston & Co. to Cross, in all that you did about said suit and bonds, act for and on behalf of Cross, Ludington, and Scott?

Answer. I acted for them and in their behalf as bondholders, but strictly speaking, I acted for Mr. Williamson; I corresponded with him, Williamson, the trustee in the mortgage; he desired to know everything going on; there was very little communication between the trustee and myself; that was by letter; he seemingly acquiesced in the directions given me by the bondholders; he did acquiesce in it; he took his fees and went out of court.

Question. Can you and will you furnish the correspondence between you? Yes.

Question. Did J. Boorman Johnston & Co., when they accepted said 42 of said bonds as collateral security, or at any other time, insist that any, and how many, of said bonds secured by said first mortgage should be deposited with M. K. Jessup & Co. to be kept out of circulation? and were any, and how many, so deposited?

Answer. I know nothing whatever about it; all that took place with reference to that deposit of bonds was before my connection with the matter.

Adj'd to October 10, 1862, at 9 a. m.

OCTOBER 10, 1862.

Adjourned by consent of parties to January 16, 1863.

135 JANUARY 16, 1863.

Adjourned by consent of parties to January 17, 1863.

JANUARY 17, 1863.

Complainants appear by M. H. Carpenter and A. A. Jackson, esq'rs, their counsel, and all the defendants, but the city of Milwaukee and the railroad company, appear by N. J. Emmons, esq., their counsel, and the examination of the witness Emmons was continued.

The witness desires to make an explanation, and does so as follows: I was asked on my former examination if I would produce the correspondence and myself relating to this foreclosure. I don't now remember how many letters I rec'd from him relating to the subject prior to the final decree. I think but one; perhaps two. The letter or letters are now on file with the clerk in the principal cause of foreclosure, as I believe. I do not find any letters on my own files prior to the decree. I know that whatever letters I had rec'd from him were used on the final hearing, and they related exclusively to the am't to which he conceived himself entitled as trustee in the foreclosure suit. The other letter which I excepted above, and which was received after the decree, was a mere acknowledgement of the remittance by me to him of the sum allowed him personally by the court as trustee in that suit. The record will speak for itself as to what the allow-
136 ance was made for.

Question. Did you receive any letters prior to the commencement of the foreclosure suit in relation to the foreclosure of that mortgage from the trust company, or from Mr. Williamson as president?

Answer. I think not—that is, not on the subject of this foreclosure.

Question. At what time did Cross apply to you for information in relation

to those judgments, and the collaterals, on behalf of himself, Scott, and Ludington?

Answer. I can't fix the date precisely. It was prior to the date of the assignment. I think it must have been after the suit was commenced; the ass't is dated May 5, 1859. It was after the suit was commenced, and but a short time prior to the assignment. The conversation I had with Scott, Ludington, and Cross on this subject was contemporaneous.

Question. At what time did the conversation accrue in which you told Scott, Ludington, and Cross that you thought the only hope of collecting the judgment was through a foreclosure of the mortgage?

Answer. At the same time or times of the other conversation with them to which I have referred, and I wish to add that I based my opinion upon what I then supposed to be the fact, that the corporation itself as a corporation was worthless, independent of the property covered by the mort-
137 gage, and that the endorsers, who were collaterally liable, had become pecuniarily irresponsible.

Question. You say on your previous examination that you think the idea of foreclosing the mortgage came from you. Now to whom did you express this idea, and at what time, and who was present at that conversation?

Answer. I meant, of course, that the idea occured and was expressed as between myself and my clients. It was not in conversation, but in correspondence with my clients J. Boorman, Johnston & Co., who were my only clients at the time the idea of the foreclosure occurred. All that passed on that subject, at that time, was by correspondence, between myself and them, unless perhaps I may have incidentally conversed with them on that subject at some time in New York. I was frequently in New York at that time, and probably called on them every time I was there. Had other large interests in charge for them at the same time. I understand that the members of the firm, or some of them (of J. Boorman Johnston & Co.) have been examined as witnesses in this case, on commission. I don't know what they have testified to, but if in the course of their examination, or otherwise, they have manifested a consent, I am entirely willing to produce all the correspondence between themselves and myself, or the
138 firm of Emmons & Van Dyke in regard to this foreclosure. Unless they consent, I must deem this correspondence their property, as my clients. This part of my answer is responsive to a suggestion from Mr. Carpenter that I produce this correspondence.

Ques. Prior to the commence't of the foreclosure did you have any conversation with Haertel, Button, Hull, or Alton, or any of them or any other of the directors of the Milwaukee and Sup. RR. Co., in relation to the foreclosure of that mortgage?

Ans. I never had any conversation with Alton, I think I never had any with either Mr. Button or Mr. Hull on that subject. I did, however, have frequent conversations with Mr. Hautel and with Mr. J. Stark; I think the latter was a director, tho' I am not certain. He was secretary of the company, and so acted.

Ques. Will you state those conversations, and the time at which they occurred?

Ans. They were frequent and repeated. They commenced prior to the time of filing the bill of foreclosure. It would be impossible for me at this time to state all that transpired in conversation during those interviews. I was aiming to collect the debt of my clients against the RR. Co., and those endorsers. Mr. Stark and Hautel joined me in that effort. Mr. Haertel and Mr. Stark both seemed to first desire to protect the city of Milwaukee and
139 at the same time if possible to protect the individual endorsers. At that time there was $100,000 of the bonds nominally outstanding,

and these by the officers of the company alledged to have been fraudulently put in circulation by C. R. Alton, and it was also alledged that they, the $100,000 of bonds, had with knowledge of the fraud reached the hands of Levi Blossom, whose title to those bonds it was designed to impeach by that process of foreclosure. The chief desire of those parties, as manifested in all conversations, was that road or the mortgaged property should pay all the debts of the company. At that time the city was recognized (in those conversations and without any examination) as a valid incumbrance of the road. The mayor of the city, Wm. A. Prentiss, and members of the common council were called into our counsels with the view of protecting all parties. We all agreed that a foreclosure would be the best thing. About this time on Mr. Prentiss making a visit to New York City on official business, I gave him a letter to my clients. During those interviews and deliberations I conceived that the bonds which were lodged with Jessup & Co. were really lodged there for the benefit of my clients, J. Boorman Johnston & Co., and it being at the time conceded that the railroad property
140 could not produce the whole amount of the bonds, which I believe was $550,000—the larger the am't of bonds in the hands of bona fide creditors the better, especially when they were held as merely collateral security. I suppose I need not add that the design was to impeach the Blossom bonds, and they were afterwards impeached by the decission of the court. During those interviews with Mr. Stark and Hautel I urged that the company should formally transfer the bonds held by M. K. Jessup & Co. to Boorman Johnston & Co.

Question. Was it the conclusion of those conversations that the mortgage should be foreclosed, and did you so advise your clients?.

Ans. My own opinion was unhesitatingly that it was the only means by which they could collect their debt. As to what I advised my clients, I must refer to the records as to the course I took.

Ques. Did the other parties in the conversation concur with you in the opinion that the mortgage should be foreclosed for the purpose of protecting the interests of the parties interested?

Ans. I don't think Mr. Stark or Mr. Haertel ever did fully concur with me. They wished to accomplish objects which I deemed utterly impracticable in view of the value of the property. They did concur with me in my
141 belief of the absolute necessity of the foreclosure of the mortgage.

Ques. What was it which you say Stark and Haertel desired to accomplish, and which you deemed impracticable?

Answer. They wanted my clients to assume responsibilities and liabilities which they were unwilling to do, and which I was unwilling to consent to as their attorney. I would not consent to this action in this matter, except as creditors, and with the same relations as to an ordinary foreclosure of an ordinary mortgage of real estate. Pending these conversations or negotiations, and after the commencement of the foreclosure, Cross purchased the judgments with all the collateral securities.

Question. Did not Mr. Hautel desire a foreclosure of the mortgage, and that the money due Johnson & Co. should be made by such foreclosure, so as to release the endorsers on the notes held by Johnston & Co., and did he, Hautell, not urge as a reason for such desire that the endorsers had no security whatever?

Answer. Judging from what he said I think he did desire a foreclosure of the mortgage. I think may also say that one reason why he desired it was that the creditors who held the mortgage bonds as collateral security,
142 also held him collaterally liable as endorser for the principal debt. I will add, however, that all the conversations which I had with Mr. Hautel he manifested as much desire to pay all the other acknowledged debts of the company as he did that of J. Boorman Johnston & Co.

Question. Were you requested by the Farmers' Loan and Trust Co., or by its president to foreclose that mortgage?

Answer. As a legal proposition I should say, unhesitatingly, yes, but as my opinion is based on facts, perhaps I had better state the facts. I don't remember of having any correspondence direct with the officers of the company prior to the commencement of the suit. I was informed, however, that my clients had conferred with Mr. Williamson, president; that counsel had been taken in New York, and that the president had given his assent. My subsequent correspondence with him, to which I have herein before referred, I regarded as a full ratification of all that I had done. It is barely possible I may have other letters with him on this subject, and if I have and can find them I will produce them.

Question. Were you advised of the assent of the president of the Farmers' Loan and Trust Co. to the foreclosure of that mortgage before or after
143 you had advised your clients that in your opinion it was advisable to foreclose that mortgage for the purpose of protecting their interests?

Answer. Not until afterwards. I am not aware of any application being made to the president till I communicated the idea to my clients.

Question. Did you draw the resolution authorising the delivery of the 280 bonds held by M. K. Jessup & Co. to Johnston & Co., or did you know anything about it?

Answer. I knew about the resolution; I don't know whether I drew it or not. All my present recollection is, without referring to documents or papers, that the first knowledge I had in regard to those bonds came from the officers of the railroad company. My own impressions, at this time are that I did draw the resolutions; I drew some at one time. I have before stated that I drew some resolutions without referring particularly to these. If I did draw them, the originals are probably still in existence, in my handwriting. The proposition for the transfer of these bonds came from the officers of the company, and I may have drawn the resolutions with the view of my clients acting upon them, but whether I did or not I can't remember. When I was first called upon to testify in this case I had not, nor have I up to this time examined a paper or document relating to this
144 matter, except the assign't produced before the com'r. I spoke from recollection merely. The officers of the company who made the proposition for the transfer of the bonds was Mr. Stark and Mr. Haertell.

Question. Who drew the ass't from Johnson & Co. to Cross, Ludington & Co.?

Answer. I think I did myself; or at least it was done under my supervision, in my office, by my clerk.

Question. Did you forward to them for execution?

Ans. I did; either personally or through my clerk.

Question. Was it returned to you by them?

Answer. It was.

Question. Were any other papers returned with it, and what?

Answer. I can't tell. I presume by reference to the correspondence, which I have not consulted, I might; there must have been a letter accompanying it, and that could tell.

Ques. Were the bonds held by Johnson & Co. sent you?

Ans. Yes; they were sent me by express; they did not accompany the letter; the letter perhaps stated that they were sent by express.

Ques. Were they the bonds mentioned in the resolutions of March 3d, 1859?

Ans. I think they were, if March 3d was the date of the resolution.
145 I think I examined at the time, before I assumed the custody of

them, and found they were. They were intended to be, and I believe were, the bonds mentioned in the assign't, so far as they could be identified by numbers and description.

Ques. What did you do with the bonds?

Ans. I delivered them to Mr. Cross, the assignee of the judgments. The personal delivery was to Mr. Scott, to which Mr. Cross and Ludington assented.

Ques. Were they the same bonds that were presented on behalf of Ludington, Cross, and Scott before the master in the foreclosure suit?

Answer. I have no personal knowledge whether they were or not. I have every reason to believe that they were. I was not personally present at any time during the hearing before the master. Mr. Butler, I was informed, appeared for Cross, Ludington, and Scott, before the master. Butler also appeared for them on the hearing of the exceptions to the master's report.

Ques. Were these the same bonds that were subsequently sold at auction at the Chamber of Commerce?

Ans. I think I may safely say they were; all parties acted upon the supposition that they were the same identical bonds.

Ques. Who acted as auctioneer at that sale of the bonds?

146 Ans. I don't know whether we had a professional auctioneer or not, but, to all intents and purposes, I believe I was the auctioneer myself.

Question. Were they sold in pursuance of the notice published in the Milwaukee News?

Answer. They were. I drew the notice, and advised Mr. Cross to publish it in the Daily News.

Question. Did Johnson & Co. pay you for services in acting for the bondholders? And if not, who paid you?

Answer. Johnson & Co. paid me simply for my services in the recovery of the judgments against the railroad company; and the endorsers, Cross, Ludington, and Scott, paid me for my services in connection with the foreclosure suit, or Mr. Stark and myself jointly for it. Mr. Stark rendered some service in the case.

Question. At the time this sale of the bonds was made, were all those notes in judgment against the endorsers?

Answer. I couldn't tell without reference to documents. My impression is that they were all in judgments. I, or my firm, were the att'ys for the plaintiffs in all those cases.

Question. Were not some of those judgments entered by confession?

Answer. None by confession, possibly some of them may have been entered by default; but it was not until issues involving the same questions
147 had been tried in former suits and upon some of the same serious notes.

Question. Were not those judgments discharged of record within a very short time after this auction sale of those bonds?

Answer. I don't remember; I should say yes, but the record will speak for its self.

Question. If discharged, in pursuance of what arrang't were they so discharged?

Answer. I know of no other arrangement than that which was contemplated and proposed by Mr. Cross in his communication to the company, and which, I think, was referred to in my examination of October last.

Question. Was any money paid by the endorsers and judgment debtors to procure the discharge of these judgments?

Answer. I do not know.

Question. Was any paid to your firm, to your knowledge?

Answer. There was none.

Question. By whose request were the judg'ts discharged?

Answer. I have no personal recollection of discharging the judgments myself. I am informed they are discharged of record. I think it must have been done by Mr. Hamilton, my partner, and presume he did so at request of Mr. Cross.

Question. Did you receive the bonds from Johnson & Co. about the time you received the ass't from them, and soon after the ass'gn't bears date?

148 Ans. My present recollection is that I did, at or about that time. The precise date can be ascertained at the express company.

Question. Did you or y'r firm receive from the clerk of the U. S. district court, Wisconsin, the am't of money going to the bondholders after paying the expenses of the foreclosure suit?

Answer. No money passed through my or my firm's hands; the money was reported to be in the registry of the court. And I presume the ordinary course was pursued in paying it over to the att'ys of record, by drawing checks to our order, and we immediately passed the checks over to the parties entitled; this is the ordinary course pursued in the distribution of proceeds in like cases.

Question. To whom was the check for the am't due bondholders passed?

Answer. My present recollection there was nothing awarded to any one but Cross, Ludington, and Scott, and I presume the check was passed to them.

Question. For what am't was that check drawn?

Answer. I can't remember the precise am't. Mr. Jackson suggests it was about ($18,000) eighteen thousand dollars. I think he is correct.

Adjourned by stipulation of parties to January 18, at 11 o'clock a. m.

149 JANUARY 18, 1863.

Adjourned by consent of parties to January 27, 1863, at 10 a. m.

Adjourned by consent of parties to February 3, 1863.

FEBRUARY 3, 1863.

Complainants appeared before the com'r by A. A. Jackson, esq., their counsel, and the defendants, Ludington, Cross, and Scott, by N. J. Emmons, esq., their counsel, and by consent of parties before the com'r the examination was adjourned to February 4, 1863, at 2 p. m.

FEBRUARY 4, 1863, 2 P. M.

Came the parties before the com'r, as aforesaid, pursuant to adjournment; ex., on consent of both parties, adjourned to Feb'y 5, 1863, at 10 a. m.

FEBRUARY 5, 1863.

Parties appeared and by consent adjourned to February 6, 1863.

FEBRUARY 6, 1863.

Complainants appear before the com'r, pursuant to adjournment, by A. A. Jackson, esq., their counsel, and the def'ts, Scott, Ludington, and Cross, by M. J. Emmons, esq., their counsel; and the witness, N. J. Emmons, having read over his deposition subscribed the same before the commissioner.

N. J. EMMONS.

FRANCIS BLOODGOOD,
Examiner in Chancery.

150 Circuit court of the United States of America, district of Wisconsin

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES OF THE Boston Locomotive Works,
versus
THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, James B. Cross, James Ludington, Samuel B. Scott, and the city of Milwaukee.

The deposition of Herman Haertell, of the city of Milwaukee, taken orally, on the behalf of the complainants, before Francis Bloodgood, one of the examiners of this court.

On the 6th day of February, 1863, before the said examiner, at his office, in the city of Milwaukee, came the complainants by A. A. Jackson, esq., their counsel, pursuant to adjournment. The counsel for the defendant, Scott, Ludington & Scott did not appear. After waiting three quarters of an hour for said counsel, and he not appearing, the examination of the witness on the part of the complainants was continued.

The complainants called as a witness Herman Haertell, who, being by the commissioner first duly and publicly sworn, did depose and testify as follows: I have been a director of the Milwaukee and Superior Railroad Company; I was elected some time in 1856; in the spring of 1856. I
151 recollect of a contract being made by the company with Baily Bros. & Co., by Raymond & Co., their agents, for the purchase of iron; don't recollect the particulars of the contract; they were paid in notes with first mortgage bonds of the road as collateral; the notes were endorsed by the directors; the principal or resident directors, Messrs. Alton, Hull, Button, and myself; the construction of the road was suspended in the fall of 1857; these endorsed notes were not paid when they became due.

Ques. Was there an arrang't made between Bailey Bros. & Co. and the company by which the former were to take back all the iron not laid, and surrender the notes endorsed by the directors to that amount, and collaterals in proportion?

Ans. I believe there was such an arrangement made; the notes still held for the iron already laid were extended for six months; at the time those notes thus extended became due, that is, after the expiration of the extension, the company was insolvent or nearly insolvent; this I suppose was the case also at the time of the renewal of the notes and the surrender of the iron not laid; I rather think this condition of the road was known by the endorsers and directors; the liabilities of the road at this time, as far as I knew remained unpaid; my impression is that the number of bonds
152 issued under the first mortgage on the first division of the road was (550) five hundred and fifty; I think the amount of the notes as extended was about ($20,000) twenty thousand dollars; I think the am't of bonds held by Bailey Bros. & Co. as collateral was double the am't of the indebtedness; they held these bonds in April, 1858; I think at that time the city of Milwaukee held about one hundred of these bonds; the extended notes were not paid when they became due; a suit was brought against the endorsers and ag'st the company; I suppose, too, a judgment was entered against the endorsers; the Farmers' Loan and Trust Company were the trustee named in the mortgage; at the time of the commenc't of those suits J. Boorman Johnson & Co. were the agents of Bayley Bros. & Co. instead of Raymond & Co.; while those suits were pending I know of my own knowledge of no request being made by the directors of the company to have the first mortgage on the road foreclosed; I know of no arrang'ts being made by the directors and Johnson & Co. for the foreclosure of that mortgage.

Question. Do you recollect of any and what arrang't was made or resolutions passed in relation to the bonds returned by Bayley Bros. & Co. for the iron surrendered?

153 Ans. I only can say that there were (280) two hundred eighty-first mortgage bonds of the road held in trust by M. K. Jessup & Co. in pursuance of a resolution of the board of directors, passed Sept. 1, 1857; I don't know whether those bonds were removed from the possession of M. K. Jessup & Co; I now recollect they were; they were in pursuance of a resolution of the board of directors of the company of March (third) 3, 1859; the intention of the directors in transferring the bonds from M. K. Jessup & Co. to J. Boorman Johnson & Co. was for the purpose of protecting the endorsers on those notes, and as a further collateral to Johnson & Co; the endorsers of those notes were then directors; the main protection intended at that time was to place those bonds in the hands of J. Boorman Johnson & Co., believing they would be of no value to any one else; I don't know of any consideration having passed from J. Boorman Johnson & Co. to the company for this transfer of those bonds formerly held by M. K. Jessup & Company; I don't recollect of J. Boorman Johnson & Co. making any request for the transfer of these bonds from M. K. Jessup & Co.

Question. Did you at any time after the suits were commenced against the endorsers have any conversation with any person, and who, in relation to to purchasing the judgments and claims of J. Boorman Johnson & Co. against the endorsers and the collaterals?

154 Answer. Yes, I had; I spoke to Mr. Brodhead, Mr. Holton, and also to Mr. James Ludington; also had conversation with Mr. Emmons about it; I don't recollect precisely the time these conversations commenced; it was after the first trial; these conversations were probably one or two months before the purchase of the judg'ts, &c., by Cross, Ludington & Scott; I did'nt speak to the parties as a director, but only as a private individual. The purchase was finally completed by Cross, Ludington & Scott; I was nominally director at the time; I don't know when the functions of such road ceased. I had one or two conversations with Scott, also had a conversation with Scott and Ludington together. A defence was made by me to the suits on those notes; none was made by the RR. company, that I know of.

Question. In talking with Ludington and Scott what were your desires and intentions in relation to yourself?

(Objected to generally.)

Ans. It was my desire to get released from my liability as endorser.

Question. When these judgments were purchased by Ludington, Cross & Scott what action did they take with reference to your liability?

Ans. They released me, as I was informed by my attorney.

Ques. At the time the road suspended its work, how much of it, if any, was completed?

155 Ans. About five miles of track laid—about from the junction with the La Cross R. road; I don't know how much grading was done; the grading was nearly done, I suppose, for eight or nine miles from the junction; some little grading done near Grafton. As far as I recollect, about fifteen or twenty thousand dollars had been paid for the right of way; I am not certain about this; was several platform cars, two locomotives, ten platform cars and one hand car on the road at that time. I understood the locomotives were bo't at the Boston Locomotive Works; they were purchased, I believe, in pursuance of a resolution of the board of directors; I am not certain. But the president has some general power to purchase things.

Question. At the time of the suspension of the road what was the value of the road and property?

Ans. I don't know about the value of railroad property, but as a road it was worthless at that time; the only value was the property that could be taken off and sold.

N. J. Emmons, esq., of counsel for the def'ts, Scott, Ludington & Cross, appeared during the examination, and objected to the whole of the deposition of this witness as irrelevant and immaterial, and the deposition is taken, subject to such objections.

156 *Cross-examination by Mr. Emmons.*

Ques. Did or did not Mr. Emmons as counsel for Boorman Johnson & Co. request that the board of directors transfer the bonds in the hands of M. K. Jessup & Co. to J. Boorman Johnson & Co. as additional security?

Ans. Yes; Mr. Emmons did as such counsel.

Ques. You have stated you know of no consideration for this transfer. Did you not mean by this there was no new consideration?

Ans. I did so mean; the debt, of course, was still owing.

Ques. Did not Mr. Emmons when he made the request for the transfer of the bonds in Jessup & Co. hands, urge upon you and others of the directors this consideration: that the bonds were then really held for the benefit of Johnson & Co., and they wanted the transfer so that they could control them?

(Objected to generally, and because it is not proper ⋈-exm'n.)

Ans. Yes; Mr. Emmons did urge this.

Ques. Were the four endorsers on those notes solvent or insolvent at that time?

The others were reported to be insolvent at the time, and as for myself I was unable at that time to pay those notes, and so avowed myself.

Redirect.

Ques. You say in y'r cross-ex. that Mr. Emmons requested you and the other directors to transfer the 280 bonds from Jessup & Co. to Johnson & Co. State at what time this request was made, and was it verbal or in writing?

157 It was verbal; it was made before the suits on the endor'ts was commenced; don't recollect the exact time. I am mistaken about its being before those suits were commenced; it was some time before the resolution of March 3, 1859; only a short time before. The resolution was passed in pursuance of that request.

Ques. Did you at the time know anything about the other endorsers being insolvent, except the common report on the street?

Ans. I did not.

Ques. Is the route of the Mil. and Sup. R. Road the most feasible route between Milwaukee and Green Bay?

Ans. Yes, as far as I know.

Ques. Is it to Fond du Lac?

Ans. Yes, a part of it is. No other road running on that route.

H. HAERTEL.

Deposition read over to and subscribed by the witness before the ex'r, this 7th February, 1863.

F. BLOODGOOD, *Exam'r in Chancery.*

158 Circuit court of the United States of America, district of Wisconsin.

G. P. Drury and Wm. Page, assignees of the Boston Locomotive Works,
versus
The Milwaukee and Superior Railroad Company, James B. Cross, James B. Ludington, Samuel B. Scott, and the city of Milwaukee.

The deposition of Cyrus F. Huntsman, of the city of Milwaukee, taken orally on behalf of the complainants, before Francis Bloodgood, one of the examiners of this court.

On the 5th day of February, 1863, before the said examiner, at his office, in the city of Milwaukee, came the complainants, by A. A. Jackson, esq., their counsel, and the def'ts, Scott, Luddington, and Cross, by N. J. Emmons, esq., their counsel, pursuant to adjournment, and the examination of the complainants' witness being continued, the complainants called as witness in their behalf Cyrus F. Huntsman, who, being sworn on the part of the complainants, and being duly and publicly sworn, says—a printed notice is shown the witness, who says: This notice was published in the 4th column of the Milwaukee Daily News on the 20th day of May, 1859, which was the first publication. It was next published in same paper on the 21st May, 1859, on the bottom of the 4th column, 2d page. On
159 the 22 May, 1859, it was published in same place. On the 24th May, 1859, it was published in same paper, on 1st column of 4th page, near the bottom. On 25th May, 1859, it was published in 5th column of 3d page, near the bottom. It was published on the 26th, 27th, and 28th, and 29th, and 30th May, 1859, in same paper, on the 5th column of 3d page, near the bottom. I am at present the foreman of the said paper, and have charge of the files of the paper, and my testimony is based upon an examination of the files of said paper. I was not the foreman at the time of publication. The notice now attached to this my deposition is a printed copy of the notice referred to.

"*Notice.*—Three hundred and twenty-two thousand dollars of the first mortgage bonds of the Milwaukee and Superior Railroad Co. will be sold at auction on Saturday, the 28th of May instant, at 12½ p. m., at the Chamber of Commerce.—May 20—d 6t."

CYRUS F. HUNTSMAN.

Exam. reduced to writing, read over to and subscribed by the wit's, Feb. 5, 1863, before—

F. BLOODGOOD, *Ex. and C.*

160 Circuit court of the United States of America, district of Wisconsin.

G. P. Drury and Wm. Page, assignees of the Boston Locomotive Works,
versus
The Milwaukee and Superior Railroad Company, James B. Cross, James Ludington, Samuel B. Scott, and the city of Milwaukee.

The deposition of James B. Cross, a witness on behalf of the complainants in the above-entitled cause, taken before Francis Bloodgood, one of the examiners of this court, at his office, in the city of Milwaukee, February 5th, 1863, at 10 a. m.

Before the examiner, at his office, in the city of Milwaukee, pursuant to adjournment, came the complainants, by A. A. Jackson, esq., their counsel.

The counsel for the defendants Cross, Luddington and Scott did not appear; after waiting for his appearance till 10¾ a. m., and the said counsel not yet appearing, the examination was proceeded with, and the complainants called James B. Cross, who, being first duly sworn, did testify and depose as follows, to wit:

I am one of the def'ts.

Ques. Do you recollect of the sale by the marshal of the property
161 of the Milwaukee and Superior RR. Co.?

Ans. I do. I was present.

Ques. Do you know who purchased the road engines, road, and all the property sold?

Ans. I do. I did. I bought for myself and the def'ts Luddington and Scott, jointly.

Ques. Do you own the property now?

Ans. Some of it; the franchises of the road. Sold the rest.

Ques. State what portion has been sold.

Ans. The iron, a portion of the ties, locomotives, platform cars; I presume the chairs also and spikes; everything connected with the road that we could take off. In some instances we could not take off the ties, being resisted by parties over whose land the road passed.

Ques. Can you state to whom the property was sold?

Ans. I cannot. I had nothing to do with it personally. This was done by Mr. Scott; sold to diff't parties; don't know their names. I cannot tell for what am't it was sold; can't tell anywhere near it. I presume Mr. Scott could tell. I could not tell the time we sold. We didn't take the iron up till during the winter of 1859–'60. Commenced to sell the property in the following spring. John V. Ayre, I think, sold the iron for us on commission, or most of it, and I think he had the selling of the locomotives also. My impression is that the property sold brought over ($30,000) thirty thousand dollars. I took an assignment to myself from J. Boorman
162 Johnson & Co. of the judg'ts against the endorsers of the notes, Haertel, Button, Hull, and Alton, for the joint benefit of myself and Scott and Luddington.

J. B. CROSS.

Subscribed and sworn to, Feb. 5, 1863, before—

F. BLOODGOOD, *Examiner.*

Mr. Emmons appeared during the exam'n of compl'ts' wit's, but after this deposition was concluded, and objected to all of the deposition of this witness as irrelevant and immaterial.

Circuit court of the United States of America, district of Wisconsin.

G. P. Drury and William Page, assignees of the Boston Locomotive Works,
versus
The Milwaukee and Superior Railroad Company, James B. Cross, James Ludington, Sam'l B. Scott, and the city of Milwaukee.

The deposition of Samuel B. Scott, a witness on behalf of the complainants in the above-entitled cause, taken before Francis Bloodgood, one of the examiners of this court, at his office, in the city of Milwaukee,
163 February 6th, 1863.

Before the examiner, pursuant to adjournment, came the complainants, by A. A. Jackson, esq., their counsel, and the defendants, James B.

Cross, James Ludington, and Sam'l B. Scott, by N. J. Emmons, esq., their counsel, and the complainants called as a witness in their behalf Samuel B. Scott, who, being first duly sworn by the examiner, did testify and depose as follows, to wit:

I am one of the def'ts in this case. I recollect of the sale by the marshal of the franchises, and road, and property of the Milwaukee and Superior Railroad Company. I could not state the exact time; I should think it was in the year 1859. The property was bid off by James B. Cross. He was acting for himself, James Ludington, and myself.

Ques. Who now owns the property purchased by Mr. Cross at that sale?

(Objected to as immaterial.)

Ans. I don't know.

Ques. Do you own any of it?

Ans. I don't know as I do at this present time; I mean to except the franchises. Those, I suppose, we still own. We sold the rest of the property. I cannot state to whom it was sold. Most of it was sold by J. V. Ayres, of Chicago. The property sold consisted of the iron, chairs, spike, two locomotives, and, I think, ten plat. cars.

Ques. For what amount was this property sold?

(Objected to generally.)

164 Ans. I haven't the figures to state the positive amount. I should think it was in the neighborhood of $30,000; may have been a trifle over, a $1,000 00 or two. Think Ayres sold all the property except fifty tons of iron, which I sold. I rec'd $45 00 a ton for the iron I sold. (A general objection made to all this testimony.) I don't know how many tons of iron there were in all.

Ques. Was the consideration named in the assignment from J. Boorman Johnston & Co. to Cross the actual consideration paid for the assng't of the judg'ts and the collateral bonds?

(Objected to, irrelevant and immaterial.)

Ans. Yes, I think it was.

Cross-examined.

Ques. What am't of money, if any, did you pay out in addition to the am't for the ass'g't of the judg'ts, or, in other words, how much in the aggregate did the property cost you?

(Objected to generally, and as not proper cross-ex'n.)

Ans. We paid out $7,000 00 or $8,000 00 in addition to the consid'n of the ass'g't.

Ques. Do you include in this the judgments obtained ag'st Cross by parties over whose lands the road passed?

(Objected to as not proper cross-exam'n, and as immaterial and irrelevant.)

Ans. I do not.

Ques. Were there not a number of suits commenced and some of them still pending?

(Objected to as before.)

Ans. Yes; one or more.

Ques. Was not one judg't obtained against Cross, Ludington, and

165 Scott?

(Objected to as before.)

Ans. There was.

Redirect.

You say you paid $7,000 00 or $8,000 00 in addition to the consid'n for the ass't. Will you state to whom this was paid?

Ans. I should think some $3,000 00 or $4,000 00 to attorneys for negotiating the purchase, and for attending to the matters throughout, and some $3,600 00 paid for the Blossom bonds.

Q. Can you tell of that $3,000 00 or $4,000 00 what was paid for the negotiating of the purchase from Johnson & Co. and what for the negotiation of the purchase from Blossom?

Ans. The larger share was for the negotiation of the purchase from Johnson & Co. and the suits attending the purchase, including the costs of the foreclosure of the mortgage, the proceedings before the master, &c. The mortgage foreclosure I refer to was the foreclosure of the railroad mortgage. The suits I refer to were those connected with the purchase. The suits brought by the parties over whose land the road passed were a portion of them.

S. B. SCOTT.

Read over to and subscribed by the witness before the com'r this 6th February, 1863.

F. BLOODGOOD, *Examiner, &c.*

166 Circuit court of the United States of America, district of Wisconsin.

GEORGE P. DRURY AND WILLIAM PAGE, ASSIGNEES OF the Boston Locomotive Works,
versus
THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, James B. Cross, James Ludington, Samuel B. Scott, and the city of Milwaukee.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

Testimony taken on the part and behalf of the complainants before Francis Bloodgood, one of the masters and examiners of the said court, at his office, in the city of Milwaukee, October 9, 1862.

Deposition of Joshua Stark, on behalf of said complainants. Present: J. H. Knowlton and M. H. Carpenter, esqs., of counsel for the complainants, and N. J. Emmons, esq., of counsel for the defendants James B. Cross, James Ludington, and Sam'l B. Scott.

Joshua Stark being called as a witness on behalf of the complainants and being by the master and examiner first duly sworn, did testify and depose as follows, to wit: I know the defendants to this suit.

167 Question. Do you know anything, and what, of the Milwaukee and Superior Railroad Company at any and what time purchasing iron for this railroad of Bayley Brothers & Company, or any other persons or parties, and of the payment thereof having been secured by any and what collaterals; what was finally done with the collaterals, if any were given, or do you know of any, and what, and of the bonds of said railroad company having been deposited with any persons or parties in the city of New York, or in the county or State of New York; and if so, what was finally done with those bonds, and under what agreement, and by whom made?

(The def'ts counsel objects to the question, 1st, generally as seeking to elicit incompetent and irrelevant testimony. 2nd. Objects in advance to any testimony that may be given in answer to this question.)

Answer. In the latter part of the year 1856 a contract was made between the Milwaukee and Superior Railroad Company and Bayley Brothers & Company, of Liverpool, through their agents, C. B. Raymond & Co., of New York, for the purchase of railroad iron, to be delivered in 1857, the railroad company to give its promissory notes for the am't of the purchase-money on the

delivery of the iron, and the notes to be endorsed by four of the directors of the
railroad company, and secured by deposit of first mortgage of the
168 railroad company as collateral in the proportion of two thousand dollars of bonds to one thousand of indebtedness. The first mortgage bonds were issued about the month of January, 1857, and were dated, I think, the 1st of January, 1857. The am't of the entire issue then contemplated was five hundred and fifty thousand dollars. During the summer of 1857 a pretty large am't of iron was received under the contract named, and notes and bonds delivered therefor. In the fall of 1857 the financial crisis compelled a suspension of the construction of the railroad. About this time, or soon after, an arrangement was made whereby the iron rec'd by the company, but not yet laid, was returned to the agents of Bayley Bros. & Co., and the notes and collaterals of the company given therefor were given up, and in consideration thereof the notes given for the iron already laid were renewed and the time of payment extended; I don't recollect how long; I think it was six months; am not sure. The notes thus remaining in the hands of the agents of Bayley Bros. & Co. amounted to about twenty-one thousand dollars, for which they held as collateral forty-two first mortgage bonds of the railroad company for one thousand dollars
each. Two of these forty-two bonds were in fact delivered to the
169 agents of Bayley Bros. & Co. in the spring of 1858. In connection with this arrangement the board of directors of the railroad company as appears by their record, (I was not present at the meeting,) passed a preamble and resolutions providing for the deposit.

(The def'ts' counsel here interposed the objection that if the witness is speaking from the record the records should be introduced.

The book of records of the railroad company were then introduced and identified by the witness, who then stated that the preamble and resolutions he referred to were on pages, 97, 98, and 99 of said book of records.

A copy of the said preamble and resolutions are to be annexed by the examiner to the witness's deposition, marked Exhibit A.

The counsel for the def'ts says and stipulates that copies of any records taken from said book may introduced in evidence with the same force and effect as the original records, saving only his exception as to the pertinency and materiality of the same, and he does here enter his objection thereto. As to whether the bonds referred to in the said resolution were delivered to M. K. Jessup & Co., I don't know personally, but know a package of them was made up for delivery.

The complainants here introduced records of said company contained on pages 121 and 122 of the records of said company, a copy of which is to be
annexed to the deposition of the witness, and marked Exhibit B.

170 The complainants here introduced records of the company contained on page 125 and a part of 126, of the records of said company, being the record of a meeting held on the 21st April, 1859, a copy of which is to be annexed to the deposition of the witness, and marked Exhibit C.

The claimants here introduced records of company contained on pages 127, 126, and 128, of the records of said company, being the record of a meeting held May 17, 1859, a copy of which is to be annexed to the deposition of the witness, and marked Exhibit D.)

Herman Haertel, David P. Hull, Conde R. Alton, and Edward Button were endorsers of the notes upon which the judgments referred to in the resolutions were recovered, and were directors of the company. I was secretary of the company from the beginning of 1858, and also one of the directors of the company up to the 8th day of August, 1860. I was director all the time from the organization of the company. The suits upon the the notes referred to against the company and the endorsers were commenced in the summer

or fall of 1858, and from time to time afterwards as the notes became due. The suits were defended by Mr. Haertel and Mr. Button. On trial of one of them in the winter ('58–'59) the plaintiffs recovered judgment. About that time Mr. Haertel entered into negotiations with Johnston & Co.
171 through their attorneys in Milwaukee, Emmons & Van Dyke, to induce them to make the amount of their claims in some way out of the railroad. It was in pursuance of those negotiations that the resolutions of March 3d, 1859, were passed, authorizing the two hundred and eighty bonds deposited with Jessup & Co. to be delivered over to J. Boorman Johnston & Co. as additional security for their claims. Mr. Haertel also urged that the first mortgage given to secure these bonds should be foreclosed, and the road sold, and tried to induce Johnson & Co. to purchase the road on such sale for a sufficient sum to cancel their claims, and the 280 bonds were authorized to be given to them to enable them to do so without sacrifice. A foreclosure of the mortgage was commenced, I think, in Dec'b'r, 1858, in the U. S. district court, upon Mr. Haertel's guaranteeing the payment of the expenses of the foreclosure. Johnson & Co. assented to the foreclosure, but refused to undertake to purchase the road as desired by Mr. Haertel, insisted upon holding the directors personally as endorsers. Johnston & Co. at first refused to accept the additional security of 280 bonds tendered by the resolutions of March 3d, whereupon Mr. Haertel commenced negotiating with parties in Milwaukee, particularly with Mr. J. B. Cross, to induce him to purchase the claims of Johnston & Co., and take the
172 callaterals with them, and make the amount of the indebtedness out of such collaterals, or of the road itself. That negotiation resulted, as I understood from Mr. Haertel, in an agreement some time in the early part of April, 1859, whereby Jas. B. Cross became the purchaser of all the notes, including those in judgment from Johnston & Co., and agreed to make pay't of those claims exclusively out of the securities thereof on which he should derive from Johnston & Co. by the purchase. To facilitate this purchase, and authorize it to be made, the resolutions of April 21st, 1859, were passed. Between that time and the 17th May, 1859, the transfer was effected by Johnston & Co. to J. B. Cross. After the passage of the resolutions of May 17th, 1859, the 322 bonds of $1,000 each rec'd by Cross from Johnston & Co. were, as I am informed by Cross, sold at the Chamber of Commerce in Milwaukee at auction, and bid off by Mr. Cross at seven cents on the dollar.

Question. Do you remember about the time of the sale of the railroad property under the decree entered in the foreclosure suit of which you have spoken? If so, what was that property, and what was its value at the time of the sale?

(Objected to, for immateriality and irrelevancy.)

173 Answer. I recollect about the time of the sale; think it was in Sept'r or October, 1859. The property covered by the mortgage and decree, and sold as I suppose, consisted of about ten miles of roadbed complete, about five miles of track laid with T rail, the requisite ties, chairs, and spike, two locomotives and tenders, and, I think, ten platform cars. It also covered the franchise of the company. I believe there was some six or eight miles of board fencing belonging to the road. I don't know that I know the value of property at the time of the sale. In my opinion the value of the iron rails at that time was forty dollars a ton, or more, and there were about five hundred tons in the five miles. I don't know the value of the spikes and ties. The locomotives cost upwards of nine thousand dollars apiece; had been used very little; were worth a little less probably at the time of the sale. The platform cars were worth about five hundred dollars apiece. I am not competent to value the road bed and franchises of the company. The fence was a good four-board high fence. The books of the

company were in my possession at the time I was secretary. When I ceased to be secretary a clerk in my *my* office was appointed secre-
174 tary, and I was elected president, and continued to be so till this time. The books, including the one produced, have continued in my possession. The endorsers of the note were directors at the time they made the endorsements, and continued to be so up to the present time, except C. R. Alton and D. P. Hull, whose resignations were accepted on the 3d March, 1859, and Bedford B. Hopkins and J. G. Harrington were elected in their places.

Cross-examination.

Question. When the locomotives were sold by the Boston Locomotive Works to the railroad company what did the locomotive co. rec. in pay't, or as security for pay't, if anything?

Answer. They rec'd the co.'s notes, secured by farm mortgage bonds at 75 cents on the dollar as collateral.

Question. Have those farm mortgage bonds, or the notes, ever been returned to the company, or offered to be returned, or cancelled? And if so, when, and where, and under what circumstances?

Answer. They have not to my knowledge.

Question. At the time of the purchase of the judgment by Cross and others the project of the building of the railroad was pretty much abandoned, was it not?

175 Answer. I think it was. It certainly was entirely by the company.

Question. Had Haertel and others, the endorsers, to y'r knowledge, any other security or indemnity for their endorsements than such as was worked indirectly by the lodgment of mortgage bonds with Bayley Bros. & Co., or to their use?

(Objected to, as irrelevant.)

Answer. No, sir; they had not.

Question. In fixing the value of the iron did you deduct the probable cost of taking it up?

Answer. The value I put upon it was its then value at the dock in Milwaukee. I deducted no probable expense for taking it up.

JOSHUA STARK.

MARCH 3D, 1863.

Parties appeared as before, before the commissioner, A. A. Jackson for the plaintiffs, and N. J. Emmons for the defendants Cross, Ludington, and Scott, and the examination of the witness Joshua Stark, on behalf of the complainants, was resumed.

I don't remember exactly the amount of iron rec'd under the contract with Bayley Bros., but think about a thousand tons was received. That kind of rail would lay about one hundred tons to the mile at a rough estimate. All the iron was surrendered and returned, except what was actually laid, about five miles of track. With regard to the am'ts of iron I speak from
176 impressions which have grown somewhat indistinct, owing to the time that has elapsed. I think the co. had given notes for iron to the amount of $60,000, and upwards, all of which were surrendered to the co. on the return of the iron, and new notes given by the co. for about $20,000 of iron. I think the am't of iron returned was not far from 800 to 1,000 tons. If you desire more accurate information I can obtain it from the books. An equivalent amount of the bonds of the co. were surrendered. I think the am't of bonds was somewhere from $60,000 to $80,000. The bonds had been taken as collateral to the notes, at the rate of fifty cents on the dollar. The

$20,000 were new notes; the old notes taken up, and new ones given. They were endorsed by the same endorsers as the old notes. I think the work on the road had been suspended at the time the iron was surrendered, and also I think at the time the new notes were given. The company was insolvent at this time, I think. It was unable to meet its obligations. Notes and iron was surrendered in the autumn of 1857, I think in October.

Ques. In whose hands were the 550 bonds in April, 1858?

Ans. At the end of April or 1st May, 1858, 128 bonds were deposited with the city of Milwaukee, were pledged to that city; 42 were pledged to J. Boorman Johnson & Co., as collateral to the iron notes then outstanding; 100 were in the hands of Levi Blossom, or under his control, and 280
177 were sealed up and deposited with M. K. Jessup & Co., in pursuance of a resolution of the board of Sept'r first, (1st,) 1857. That is all the bonds that were ever issued.

Ques. Had any resolution been passed at that time; that is, prior to the 1st May, '57, in relation to the Blossom bonds?

Ans. Yes; a resolution had been passed on the 12th day of April, 1857. It is found on page 115 of the records of the company. It was a resolution, the 100 bonds in hands of Blossom.

Ques. Did the 280 bonds deposited with M. K. Jessup & Co. contain any, and how many, of the bonds surrendered by Bayley Bros. & Co. as collateral to the notes surrendered?

Ans. They didn't contain any of them. I am confident they did not.

Ques. Do you know at what time the 280 bonds were placed in the hands of M. K. Jessup & Co.?

Ans. I think during the month of Sept., 1857.

Ques. At the time of the suspension of the road what cars had the road, and what did its personal property consist of?

Ans. I think I have answered this question before. Besides being a director I was the attorney of the co. from its organization to its suspension.

Ques. Did you ever have any conversation with the att'y for the trustee in the forclosure suit prior to the commencement of the suit, and at what time, in relation to the foreclosure of the mortgage?

178 Ans. I had some conversation with Mr. Emmons, the att'y for the holders of the iron notes. He was also the att'y of the trustee after the foreclosure suit was commenced.

Ques. Were the applications from you to foreclose the mortgage or from him?

Ans. I, in the interest of some of the directors, and at their request, was seeking to have the mortgage foreclosed for the pay't of the iron notes, and these conversations with Mr. Emmons were with a view to induce his clients to pursue that remedy for the collection of those notes. The directors I speak of were the endorsers of the notes.

Ques. What was the object of the directors and yourself, so far as relates to those directors in desiring to have the mortgage foreclosed?

Ans. It was to relieve themselves from the pay't of those notes by having them paid out of the proceeds of the road. These conversations were had at different times for from two to three months before the commence't of the foreclosure. I don't know of any application being made to the trustee to foreclose the mort., except from what Emmons said, and his acting on the authority of the trustee. As to what passed with the trustee I have no knowledge except what may have been reported to me by Mr. Emmons in conversation.

Ques. Was not some arrang't made on the part of the directors by
179 giving security or otherwise to induce the foreclosure?

Ans. I believe one of the directors did furnish some security for the

costs of foreclosure, which was satisfactory to Mr. Emmons. What it was I don't know.

Ques. Was it an application by the directors to J. Boorman Johnson & Co. to foreclose their mortgage and make their money in that way, or was this plan suggested to them by the directors?

Ans. There was. I think I wrote to them myself. I can't remember the date of this letter. I am not sure whether I have a copy of the letter. It was some time in the summer or fall of 1858. Their reply came from their att'y, refusing. I can't give the date of the reply. I should think it was three or four months before the foreclosure suit was commenced. My recollection is, that was after some of the suits on those notes had been commenced. I don't know what connection J. Boorman Johnson & Co. had with the foreclosure, except through Mr. Emmons.

Mr. Emmons here applied for an adjournment or continuance to such time, after Saturday of this week, as would suit the convenience of the examiner and counsel for the complainants. The taking of the testimony before the examiner had been adjourned from the 27th March, on motion of the complainants, and by consent of Mr. Emmons, of counsel for the defendants

Cross, Ludington and Scott, to this day, March 3d, 1863, at 2½ o'clock
180 p. m., but Mr. Jackson, of counsel for the complainants, and Mr. Emmons, of counsel for the deft's Scott, Ludington and Cross, appeared before the examiner at ten o'clock in the forenoon, and requested him to proceed and take the testimony, Mr. Emmons stating that he would be compelled to leave for Madison on the 12.45 p. m. train. The examination of Mr. Stark, as a witness, was thereupon resumed and continued until Mr. Jackson stated that from the course of the examination he should not be able to finish his examination on his part before afternoon. Mr. Emmons then made his motion for continuance, stating as the grounds thereof that he had come before the examiner with the understanding that Mr. Stark was the only witness the complainants were going to examine, and that his examination would be finished in time for him, Emmons, to leave for Madison in the 12.45 p. m. train, and that had it not been for that understanding he would not have appeared this morning, but would have had an application made for an adjournment in his behalf at 2½ p. m., the hour fixed for the examination, on the ground that he had been compelled to leave the city on business at Madison. Mr. Jackson insisted there was no such understanding or agreement between himself and Mr. Emmons, and resisted the motion for continuance,

stating that he had come from Janesville on purpose to take the testi-
181 mony, &c. The examiner refused to adjourn the examination. Mr. Emmons protested against this decision and left. A recess until 2½ p. m. was then taken. March 3d, 1863, 2½ p. m., came the complainants before the examiner, by A. A. Jackson, esq., their counsel; none of the defendants appeared. The examination of Mr. Stark, on behalf of the complainants, was then continued, he testifying as follows:

Ques. Was there any arrang't made between the directors of the road and the attorneys of J. Boorman Johnson & Co., or J. Boorman Johnson & Co., or the Farmers' Loan and Trust Co., for the foreclosure of the mortgage? If so, with whom and what?

Ans. There was an arrang't. That I understood to be as follows, in substance: That Boorman Johnson & Co. undertook to indemnify the trustee ag'st the expenses of the foreclosure. Boorman Johnson & Co. did this upon Mr. Hautel furnishing security satisfactory to Mr. Emmons, their attorney, for that purpose; and the foreclosure was to be made and conducted by Emmons, Van Dyke & Hamilton, the att'ys of Boorman Johnson & Co., as attorneys for the trustee. The parties to this arrang't, as concerned in it, was Mr. Hautel, acting for the endorsers of the company's notes, and Mr. Emmons, acting for Boorman Johnson & Co., and the trustee, I suppose.

Ques. Was there any understanding about who should perform the labor in foreclosing this mortgage?

182 Ans. There was something said about that. I was acting as the friend of Mr. Hautel, and had been att'y of the co., and was still, and had been assisting Mr. Hautel in those negotiations, and in order to make the expenses of foreclosure, which Mr. Hautel was required to guaranty, as light as possible, it was proposed and understood that I was to perform the principal labor in the foreclosure suit.

Ques. Was this foreclosure commenced in pursuance of that arrang't?

It was.

Ques. Who drew the precipe for the issuing of the subpœna?

I have no recollection about it.

Here, at request of complainants' counsel, the witness went to the U. S. clerk's office to examine the records of the suit, and on his return answered:

I have just examined the record of the case and find the precipe is in my handwriting.

Ques. On whom was the subpœna served?

Ans. I think it was served on me as secretary.

Ques. By whom was the bill drawn in that foreclosure case?

Ans. By me. The bill filed is in the handwriting of my clerk.

Ques. By whom was the decree drawn?

Ans. I prepared the draft of the decree.

Ques. Was this labor performed by you in pursuance of the agreement you have spoken of?

It was.

Ques. Was any defence interposed by any of the defendants?

Ans. Some two or three persons were made parties because they had recovered judgments for the value of the right of way. These put in

183 answers, and the decree was drawn so as to preserve their rights. There was no trial.

Ques. Was any effort made on the part of the officers of the co. to inform the creditors of the co. of this foreclosure?

Ans. None was made that I know of.

Ques. Was any made on the part of J. Boorman Johnson & Co., or the trustee?

None that I know of.

Ques. Was or was not everything done that could be done by the endorsers and directors of the company to facilitate and render effectual the foreclosure for the purpose of benefiting and discharging the endorsers, who were directors, without regard to the interests of the creditors of the company?

Ans. The foreclosure was procured to be made by the endorsers and directors, as I have stated, for the purpose of satisfying the claims against the endorsers held by Boorman Johnson & Co., and I think the directors and endorsers did what they could to render the foreclosure effectual for that purpose and for the relief of the endorsers without any reference to the interests of other creditors.

Ques. Was or was it not the sole and only object of the directors and endorsers in procuring this foreclosure to be made as it was made to in some manner dispose of the property of the railroad company, so as to protect and discharge those endorsers and directors? If not, what was their object?

Ans. That was the object, as I understood it.

184 Ques. Do you know whether or not the endorsers and directors made any application to any and what person or persons to induce them to purchase of J. Boorman Johnson & Co. the claims held against the endorsers and directors, together with the collaterals? If so, state it.

Ans. I have no knowledge on the subject.

Ques. Have you ever been informed by any of the directors that that was the case?

Ans. Yes, sir. I have been told by Mr. Hautel that he had spoken to two or three different persons upon the subject of making such purchase.

Ques. Did he tell you whether he had completed any such arrang't or not? and if so, what?

Ans. He informed me that, among others, he had spoken to the def'ts, Cross, Ludington, and Scott, or some of them, and they had agreed to make the purchase.

Ques. What were the terms of that agree't or purchase?

Ans. I don't know how much they were to give for the claims. They were to obtain all the collaterals which had been held by Boorman Johnson & Co., together with the 280 bonds which had been deposited with M. K. Jessup & Co. under the resolution of Sept 1, 1857; and I think it was understood that, on their obtaining possession of all these bonds pledged to secure their claim, they, Cross, Ludington, and Scott, were to make their money out of the railroad and hold the endorsers harmless.

185 Ques. Was the resolution of March 3d, 1859, passed in pursuance of that agreement?

Ans. My answer to that would be that my present recollection is that I was informed by Mr. Hautel of his arrang't with Cross, Ludington and Scott, or at least of negotiations with them, with a view to such arrang't before the adoption of the resolution of March 3d, and that the resolution was adopted to facilitate the negotiations.

Ques. Do you recollect the resolution of April 21, 1859?

Ans. Yes, sir. It is on page 125 of the records.

Ques. Was that passed in pursuance of this understanding and agree't you have spoken of?

Ans. It was.

Ques. Was it any part of that agree't that judgments should be entered by confession on the notes endorsed by the directors not then in suit?

Ans. Yes. I think it was a part of the arrang't at the time that judg'ts were to be entered up against both co. and endorsers on all the notes held by J. Boorman Johnson & Co. without further litigation. A resolution was passed by the board, and is recorded on page 124 of the records, authorizing me as the att'y of the co. to confess judg'ts on those notes.

Ques. Do you know whether, in fact, judgments were entered in the manner prescribed in that resolution?

Ans. Yes, sir, they were.

Ques. Was it not a part of the agree't also that these endorsers and directors should aid and assist the def'ts, Scott, Ludington and Cross,

186 to secure a perfect title to the outstanding bonds held by J. Boorman Johnson & Co., and the 280 bonds held by M. K. Jessup & Co.?

Ans. I don't think it was then definitely understood whether Cross, Ludington & Scott should hold the bonds as collateral or should acquire a title to the same as owners; that is to say, prior to their coming into possession of their lands.

Ques. Was or was it not a part of that agree't that the endorsers and directors should aid and assist Cross, Ludington & Scott in perfecting a title to all of the railroad property, by virtue of that foreclosure?

Answer. I think it was.

Ques. When Johnson & Co. were first applied to to receive the 280 bonds did they consent to receive them, or refuse to?

Ans. I had no direct communication with them on the subject that I now recollect, but I think Mr. Emmons, their att'y, informed me that they declined to receive them.

Ques. What induced them afterwards to accept?

Ans. The sale to Cross, Ludington & Scott. I understood they declined to receive them till after they had negotiated the sale.

Ques. Was there any consideration for this transfer from the railroad co. to Johnson & Co.?

Ans. Not any of which I have any knowledge.

187 Ques. Do you recollect the resolution of the 17 May, 1859, page 127 and 128 of the records of the co.?

Ans. I do.

Ques. Was that resolution passed for the purpose of protecting Cross, Ludington & Scott, and to facilitate and carry out the scheme of protecting and discharging the endorsers and directors?

Ans. It was.

Ques. Was this notice published in the Milwaukee News, and the sale made of the bonds for that purpose?

Ans. Yes.

Ques. Did Cross, Ludington & Scott pay you for your services in the foreclosure suit?

Ans. Well, they paid Emmons, Van Dyke & Hamilton a fee for their services as attorneys in the foreclosure suit, and they, Emmons, Van Dyke & Hamilton, gave me a portion of it. Scott, Cross and Ludington did not recognize me as having any claim upon them directly for services, but knew that I was to receive part of the compensation paid Emmons, Van Dyke & Hamilton.

Ques. When these 280 bonds were presented before the master for allowance in favor of Cross, Ludington & Scott, was any objection made to their allowance by the directors of the co. or its attorney?

Ans. There was not.

Ques. Were the directors and endorsers aware of the fact that these bonds were presented by Cross, Ludington & Scott to the master for allowance as their own absolute property?

188 Ans. I can't say whether they were or not. After that sale the directors didn't care anything about the matter as the judg'ts ag'st them had been discharged.

Ques. Were you aware of the fact, and did you make any objection as att'y of the co.?

Ans. I was. I made no objection.

Ques. At the time those bonds were sold pursuant to the notice published in the News, had they any, and what, market value?

Ans. I don't think they had any market value, as none had been sold that I am aware of, in the market, to my knowledge.

Adjourned till 9 o'clock, March 4, 1863. March 4th 1863, complainants appeared as before, pursuant to adj't. The defendants did not appear. The examination of Mr. Stark was continued.

Ques. What, if any, knowledge have you in relation to the discharge of the judgments against the endorsers on those iron notes?

Ans. I went with Mr. Hamilton, of the firm of Emmons, Van Dyke & Hamilton, to the office of the clerk of the U. S. district court, and was present while he discharged the judgments on the judg't docket.

Ques. Was any money paid by the endorsers for the purpose of procuring such discharge, or did any consideration pass from them to procure the same?

Ans. None of which I have any knowledge.

189 Ques. Would you have known the fact had any been paid?

Ans. I think I would.

Ques. How, then, came Emmons, Van Dyke & Hamilton to discharge these judg'ts?

Ans. They were discharged because Cross, Ludington & Scott had become the purchasers of the 322 bonds pledged to them at the public sale, and the discharge of the judgments was the pay for those bonds.

Ques. Did you have frequent or any conversations with Emmons, Van Dyke & Hamilton and Mr. A. R. R. Butler, both before and after the assignment from Johnson & Co. to Cross, Ludington & Scott, in relation to the purchase by Cross, Ludington & Scott of Johnson & Co. of the indebtedness held by them against the endorsers and directors of the co.?

Ans. Yes, I talked with Mr. Emmons and Mr. Butler on the subject.

Ques. During any of the conversations with Emmons and Butler was the indebtedness of the railroad co. to the Boston Locomotive Works mentioned or spoken of?

Ans. In some of the conversations a suit then pending in the circuit court of Milwaukee Co., bro't by the Boston Locomotive Works against the railroad co., to recover two locomotives which they had sold and delivered to the co., was spoken of.

Ques. Were not the chances of recovery in that case taken into
190 consideration and into the calculation in making the sale and transfer from Johnson & Co. to Cross, Ludington & Scott?

Ans. I think they were. I informed Mr. Butler, I am sure, and I think Mr. Emmons of the character and condition of this suit.

Ques. Who was the att'y for the def'ts in this trial of the Boston Locomotive Works against the railroad co.?

Ans. I was.

Ques. Were you acting as the att'y of railroad co. at the time this suit was commenced and the answer put in?

Ans. I was.

Ques. Did you continue to conduct the defence of that suit after the sale of the locomotives on the the foreclosure, as the att'y for the railroad co., or how otherwise?

Ans. I continued to act as att'y in the defence of that suit until it was discontinued the winter following. After Cross, Ludington & Scott purchased the claims of Johnson & Co., Mr. Butler spoke with me about that suit and desired me to continue to defend it, as involving a part of the property covered by the mortgage.

Ques. In what capacity was Mr. Butler acting in making this request?

Ans. He assumed to be acting as the att'y of Cross, Luddington & Scott.

Ques. In those conversations had with Mr. Butler, was acting or pretending to act as the att'y of Cross, Ludington & Scott?

Ans. He was pretending to act as their att'y, and I supposed he was their att'y.

Ques. Were those conversations had with the view on the part of Butler to ascertain the pecuniary condition of the road and the chances of
191 making anything by buying the claims of Johnson & Co.?

Ans. I think his object was to ascertain the value and extent of the property covered by the mortgage, and the am't and character of the claims secured by the mortgage or by the mortgage bonds.

JOSHUA STARK.

Subscribed by the witness before me, after being read over by him, this 4th March, 1863.

FRANCIS BLOODGOOD, *Examiner and C.*

In circuit court, United States of America.

GEORGE P. DRURY *et al.*
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY.

Deposition of Benjamin H. Edgerton, on behalf of the complainants, before F. Bloodgood, com'r, taken March 4, 1863.

Present: Complainants by Mr. Jackson, their counsel; the defendants did not appear. The matter was brought before the commissioner pursuant to adjournment from March 3, 1863. Mr. Emmons left the office of the comm'r on the last-mentioned day and did not again appear before the comm'r for the reasons stated in the annexed deposition of Joshua Stark.

192 Benjamin Edgerton, sworn, says: I am a civil engineer. I was acquainted with the price of materials for building railroads before and subsequent to 1859.

Ques. What, in your opinion, was the value of chairs for laying railroad track at that time?

Ans. The common wrought chair was at that time worth from three to three and a half cents a pound.

Ques. How many tons of chairs to the mile are used in laying track?

Ans. About five thousand pounds per mile.

Ques. What, then, would chairs be worth per mile?

Ans. From one hundred and fifty to one hundred and seventy-five dollars per mile.

Ques. What would the spike be worth per mile used in laying the track?

Ans. About the same.

Ques. What would the ties be worth per mile?

Ans. About $660.

Ques. What is the common board fence, such as is put on both sides of the road, worth to take down and put in another place?

Ans. $160 per mile.

Ques. What is the value of the franchises of the Mil. and Sup. RR. Co. through this city?

Ans. I think it valuable, but could not state a definite sum which it would be worth.

B. H. EDGERTON.

After being read over to the witness by the comm'r, it was subscribed by him this 4 March, 1863, before me.

F. BLOODGOOD, *Ex., &c.*

193 SCHEDULE "A."

Whereas the Milwaukee and Superior Railroad Company did by resolution of its board of directors, passed the second day of January, A. D. 1857, authorize the execution of a mortgage on the first division of its road, between the city of Milwaukee and the city of Green Bay, a distance of one hundred and twenty miles, to secure the issue of the bonds of the company to the amoumt of twelve hundred thousand dollars; and whereas under the authority of said resolution said mortgage was executed providing for the issue of five hundred and fifty thousand dollars of said bonds during the present year, and of six hundred and fifty thousand dollars of said bonds during the year eighteen hundred and fifty-eight; and whereas, in consequence of the difficulty attendant upon the progress of railroad enterprises at the present time, it has been deemed expedient to proceed more slowly than was originally contemplated with the construction of said Milwaukee and Superior

railroad, and for the purpose of affording a more satisfactory and certain security to the holders of any of said mortgaged bonds, it is hereby—

Resolved by the board of directors of said company, That no more than two hundred and seventy thousand dollars of said bonds, including bonds from number one to two hundred and seventy, inclusive, shall be issued, used or hypothecated by this company until the payment to C. B. Raymond & Co. of the present indebtedness of said company to said C. B. Raymond &
194 Co., nor until the said railroad shall be completed to a point at least twenty-seven miles from the city of Milwaukee, in the direction of and towards the city of Sheboygan.

And it is further resolved, That no more bonds beyond the five hundred and fifty thousand dollars authorized to be executed this year shall be executed by said company until their said road shall be completed and in operation to the city of Sheboygan, and that until the indebtedness to said C. B. Raymond & Co. shall be paid, and the road completed to said point twenty-seven miles north from the city of Milwaukee, all of said five hundred and fifty thousand dollars in bonds, after deducting two hundred and seventy thousand dollars therefrom, shall be placed in the hands of Messrs. M. K. Jesup & Co., in trust, not to be delivered by said M. K. Jesup & Co. to the officers and agents of said railroad company until the trust for which they are placed in their hands shall be fully performed and accomplished, said bonds to be sealed up with the joint seals of the president of said company and C. B. Raymond & Co.

Which preamble and resolutions, after having been read by the secretary, were, upon motion of Mr. Hall, unanimously adopted, and the secretary instructed to forward certified copies to Messrs. C. B. Raymond & Co.
195 and Messrs. M. K. Jesup & Co., under the corporate seal of the company.

On motion adjourned.

H. W. JARES, *Secretary.*

SCHEDULE "B."

Mr. Button introduced the following resolutions, which were read and unanimously adopted:

Resolved, That the resolutions adopted by the board of directors of this company, at their meeting, on the 1st day of September, 1857, whereby the amount of first mortgaged bonds to be issued, used, or hypothecated by this company, until after the payment to C. B. Raymond & Co. of its indebtedness then existing to said C. B. Raymond & Co., was limited to two hundred and seventy thousand dollars, and directing that the balance of the first issue of first mortgage bonds, amounting to two hundred and eighty thousand dollars, should be placed in the hands of M. K. Jessup & Co., of New York, in trust, not to be delivered to this company until after the payment of their indebtedness to C. B. Raymond & Co., be, and the same are hereby, rescinded and repealed, except so much thereof as restricted the whole amount of first mortgaged bonds to be executed and issued before the completion of said company's road to Sheboygan, to five hundred and fifty thousand dollars, provided the successors of C. B. Raymond & Co., as agents of Bailey Brothers & Co., give their consent thereto.

196 *Resolved,* That the first mortgage bonds of this company, now in the hands of M. K. Jessup & Co., New York, amounting to two hundred and eighty thousand dollars, be transferred and delivered Messrs. Boorman Johnston & Co., agents of Bailey Bros. & Co., as additional collateral security for the payment *for the payment* of the indebtedness of said company to them, and that the president of this company be, and is hereby, directed to give to said Boorman Johnston & Co. an order on Messrs. M. K. Jessup & Co., at New York, therefor, for the purposes hereinbefore mentioned.

SCHEDULE "C."

On motion of Mr. Button the following preamble and resolution were adopted:

Whereas, by resolution adopted by this board on the third day of March, 1859, this company authorized and directed two hundred and eighty of the first mortgage bonds of this company for one thousand dollars each, which had been theretofore lodged with C. K. Jessup & Co., of New York, to be transferred and delivered to James Boorman Johnston & Co., of New York, as agents of Bailey Bros. & Co., of Liverpool, as additional collateral security for the payment of the indebtedness of this company to said Bailey Bros. & Co., which said indebtedness is now partially in judgment, and partially in suit in the district court of the United States for the district of Wisconsin. And whereas the said J. Boorman Johnston & Co. as such agents, are, as is represented, about to assign said indebtedness to
197 certain parties in Wisconsin: Therefore—

Resolved, That the said J. Boorman Johnston & Co. be, and they are hereby, authorized and empowered to transfer and deliver to any assignee or assignees of such indebtedness, including the said two hundred and eighty bonds received or to be received by them from said M. K. Jessup & Co., under the authority aforesaid, and that they may so transfer and deliver all of said bonds to such assignee or assignees, to be held by him or them as collateral security to said indebtedness as fully and effectually and to all intents and purposes as the said J. Boorman Johnston & Co. might or could hold the same, but for such assignment, transfer, and delivery.

On the adoption of this resolution those who voted in the affirmative were Messrs. Haertel, Button, Harrington, Hopkins, Grenlich, and Stark. Negative, none.

SCHEDULE "D."

The president laid before the board the following communication from J. B. Cross, to wit:

MILWAUKEE, 17*th May*, 1859.

To the board of directors of the Milwaukee and Superior Railroad Company:

GENTLEMEN: We are the holders of three hundred and twenty-two of the first mortgage bonds of your company, which are received by assignment from J. Boorman Johnston & Co., of New York, we holding them, as they did, as collateral security to certain claims now in judgment
198 against the company, and Haertel and others as endorsers. We desire to become, if practicable, the owners absolutely of these bonds, and to that end propose as a consideration for their purchase to cancel and discharge all the judgments against the company, Mr. Haertel, and others, amounting in the aggregate of principal indebtedness to about twenty-two thousand dollars, besides costs, which we now own as assignees of Johnston & Co. We conceive this to be more than the real value of the bonds, and more than they could be made to produce on sale, but should you desire to have them sold at public sale, and thus offer an opportunity for competition, we will advertise and so sell them. In which event we should desire you to authorize us to bid and become purchasers at the sale, we agreeing to bid therefor a price not exceeding in the aggregate the amount due on the judgments, and cancel them. Should you accede to our proposal be kind enough to express your assent in the form of a resolution at an early day.

Yours, respectfully,

(Signed) J. B. CROSS.

The communication having been read it was resolved that the same be filed and recorded in the minutes of this meeting, and on motion of Mr. Button the following preamble and resolution were unanimously adopted:

Whereas James B. Cross, of the city of Milwaukee, by assignment from J. Boorman Johnston & Co., of New York, has become the owner of the several judgments recovered by the said J. B. Johnston & Co. in the district court of the United States for the district of Wisconsin against the
199 Milwaukee and Superior Railroad Company, and Herman Haertel, Conde R. Alton, Edward Button, and David P. Hull, and has, with the consent of this company, also received from said J. B. Johnston & Co., three hundred and twenty-two first mortgaged bonds of this company, numbered respectively 269, 270, 101 to 140, inclusive, and 271 to 550, inclusive, for $1,000 each, which were held by said J. B. Johnston & Co. as collateral security to the indebtedness of this company to said Johnston & Co., on which the judgments above referred to were recovered.

And whereas said James B. Cross now holds said bonds as collateral to the same indebtedness, now merged in said judgments, amounting with interest and costs to about the sum of twenty-three thousand dollars, but without express authority to sell any of said bonds so pledged to him for the payment of said indebtedness except Nos. 269, 270, and 101 to 140, inclusive.

And whereas said James B. Cross has in and by a communication this day addressed by him to this board proposed and agreed that if this company will authorize him to offer said bonds for sale at public auction for the payment of said judgments, he will guaranty that the same shall be sold for a sum sufficient in the aggregate fully to pay, satisfy, and discharge all of said judgments above referred to: Therefore—

Resolved, That the said James B. Cross be, and he is hereby, authorized and empowered to advertise and sell said bonds so held by him, or
200 so many of them as shall be necessary, at public auction, to the highest bidder, for cash, giving at least five days' notice of the time and place of such sale, for the purpose of paying and satisfying the said indebtedness, including interest and costs on said judgments; provided, however, that the whole of said or so many thereof as shall be so sold, shall not be sold for a less sum in the aggregate than sufficient to pay, cancel, and discharge in full all the said judgments with interests and costs of suit.

Resolved, That this company hereby consents that on such sale said James B. Cross may bid upon and purchase said bonds in like manner as any other person, but not for a less sum in the aggregate than the amount due on the said judgments for damages, interest, and costs.

These resolutions were adopted by the following vote: Ayes, Messrs. Haertel, Button, Stark, Grenlich, and Harrington. Nays, none.

SCHEDULE E.

Know all men by these presents that whereas we, James Boorman Johnston, Adam Norrie, Charles H. Bergman, Isaac H. Knox, and Gordon Norrie, composing the copartnership of J. Boorman Johnson & Co., of the city and State of New York, heretofore in the district court of the United States for the district of Wisconsin, recovered the judgments following, to wit: James B. Johnson et al. *vs.* Milwaukee and Superior RR. Co., Jan 22, 1859; dam., $6,545 18; costs, $33 21; James B. Johnson et al. *vs.* Milwau-
201 kee and Superior RR. Co., April 26, 1859; dam. $5,673 93; costs, $20 82; James B. Johnston et al. *vs.* Milwaukee and Superior RR. Co., April 26, 1859; dam. $1,157 52; costs, $20 76; James B. Johnston et al. *vs.*

Milwaukee and Superior RR. Co., April 26, 1859; dam. $8,239 72; costs, $15; James B. Johnston et al. *vs.* Conde R. Alton, Dec. 6, 1858; dam. $5,712 44; costs, $33 50; James B. Johnston et al. *vs.* David P. Hull, Jan. 22, 1859; dam. $5,712 44; costs, $46 45; James B. Johnston et al. *vs.* Herman Haertel, Jan. 22, 1859; dam. $5,712 44; costs, $46 50; James B. Johnston et al. *vs.* Edward Button, Jan. 22, 1859; dam. $5,759 38; costs, $46 40;
202 James B. Johnston et al. *vs.* David P. Hull, Conde R. Alton, Herman Haertel, and Edward Button, Jan. 22, 1859; dam. $1,154 86; costs, $40 79; James B. Johnston et al. *vs.* David P. Hull, Conde R. Alton, Herman Haertel, and Edward Button, Jan. 22, 1859; dam. $1,174 76; costs, $56 58; James B. Johnston et al. *vs.* David P. Hull, Conde R. Alton, Edward Button, and Herman Haertel, April 26, 1859; dam. $5,673 93; costs, $52 16; James B. Johnston et al. *vs.* Herman Haertel, David P. Hull, Conde R. Alton, and Edward Button, April 26, 1859; dam. $1,157 52; costs, $27 54; James B. Johnston et al. *vs.* David P. Hull, Herman Haertel, Conde R. Alton,
203 and Edward Button, April 26, 1859; dam. $6,736 83; costs, $50 88; of which judgments the four first above mentioned are against the Milwaukee and Superior Railroad Company as maker of certain promissory notes, and the remainder of said judgments are against said David P. Hull, Conde R. Alton, Herman Haertel, and Edward Button as endorsers thereof.

And whereas the said Milwaukee and Superior Railroad Company heretofore, to secure the payment of said promissory notes, upon which said judgments were recovered, hypothecated to the holders thereof mortgage bonds of said company to the amount at par of $42,000, and afterwards in pursuance of a resolution of its board of directors, adopted the 3d day of March, 1859, copy of which is hereto annexed, transferred to said J. Boorman Johnston & Co., as agents of Bailey Bros. & Co., as additional collateral security for the payment of said notes, first mortgaged bonds of said company of the amount of $280,000.

And whereas the said company by resolution adopted the 21st April, 1859, copy of which is hereto annexed, authorized and empowered said J. Boorman Johnston & Co. to transfer and deliver to the assignee of said promissory notes or judgments all first mortgage bonds of said company by them held as collateral security therefor:

Now, therefore, in consideration of the sum of $13,380 20, to us in hand paid, we hereby sell, assign, transfer, and set over unto James B.
204 Cross, of the city and county of Milwaukee, State of Wisconsin, the the said judgments above mentioned, and the moneys thereby secured, and as collateral security therefor do sell, assign, transfer, and set over unto said James B. Cross, all the said mortgaged bonds above mentioned, being numbers one hundred and one to one hundred and forty, both inclusive, and two hundred and sixty-nine to five hundred and fifty, both inclusive, to be by said James B. Cross held as fully and effectually and to all intents and purposes as we might or could hold the same.

And we do hereby constitute and appoint the said James B. Cross and his assigns our true and lawful attorney and attorneys, irrevocable, with power of a substitution and revocation for the use, at the proper cost and charge of said James B. Cross, to ask, demand, and receive, and to sue out executions, and take all lawful ways for the recovery of the money due or to become due on the said judgments, and on payment to acknowledge satisfaction or discharge the same, hereby ratifying and confirming all that said James B. Cross or his attorneys shall lawfully do or cause to be done in the premises. And we do hereby covenant that there is now due on the said judgments, respectfully, the sum above mentioned, but as hereinbefore expressed as to said endorsers, and that we will not collect or receive the

same or any part thereof, nor release or discharge the said judgments,
205 but will own and allow all lawful proceedings therein, the said James B. Cross, or his attorneys, saving us harmless of and from any costs and charges in the premises; provided, however, that it is the true intent and meaning of these presents that no recourse shall be had by said Cross or his assigns to us by reason of this assignment except upon the above covenant expressed, it being expressly understood and agreed that the transfer of said mortgage bonds is made solely upon the authority of the aforesaid resolutions, and the parties making this assignment assume to transfer to or confer upon the said Cross no other right or title as to said bonds than such as was vested in and conferred upon them by said resolutions or their otherwise legal rights in the premises.

In witness whereof, the parties hereto have hereunto set their hands and seals this 5th day of May, A. D. 1859.

JAMES B. JOHNSTON. [SEAL.]
A. NORRIE. [SEAL.]
CHAS. H. BERGMAN. [SEAL.]

In presence of—
W. H. PENDLETON.
PATRICK S. HART.

SOUTHERN DISTRICT OF NEW YORK,
City and county of New York, ss:

On this fifth day of May, in the year one thousand eight hundred and fifty-nine, before me personally came William H. Pendleton, subscribing witness to the preceding instrument, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city and State
206 of New York, that he knows James B. Johnston, A. Norrie, Chas. H. Bergman, Isaac H. Knox, and G. Norrie, the individuals described in and who executed the said instrument; that he was present and saw the said James B. Johnston, Adam Norrie, Charles H. Bergman, Isaac H. Knox, and Gordon Norrie sign and deliver the same as and for their act and deed, and that they severally acknowledged the execution thereof, whereupon he, the said William H. Pendleton, became the subscribing witness thereto.

Witness my hand and seal the day and year above written.

GEO. W. MORRELL,
[SEAL.] *U. S. Comm'r, Southwest New York.*

Resolved, That the resolutions adopted by the board of directors of this company at their meeting on the 1st day of September, 1857, whereby the amount of first mortgage bonds to be issued, used, or hypothecated by this company until after the payment to C. B. Raymond & Co. of its indebtedness then existing to said C. B. Raymond & Co. was limited to two hundred and seventy thousand dollars, and directing that the balance of the first nine of first mortgage bonds, amounting to two hundred and eighty thousand dollars, should be placed in the hands of M. K. Jessup & Co., of New York, in trust, not to be delivered to this company until after the payment
207 of this indebtedness to said C. B. Raymond & Co., be, and the same are hereby, rescinded and repealed, except so much thereof as restricted the whole amount of first mortgage bonds to be executed and issued before the completion of said company's road to Sheboygan to five hundred and fifty thousand dollars; provided the successors of C. B. Raymond & Co. as agents of Bailey Bros. and Co. give their consent thereto.

Resolved, That the first mortgage bonds of this company, now in the hands of M. K. Jessup & Co., New York, amounting to two hundred and eighty thousand dollars, be transferred and delivered to Messrs. Boorman Johnston & Co., agents of Bailey Bros. & Co., as additional collateral security for the

payment of the indebtedness of said company to them, and that the president of the company be, and he is hereby, directed to give to said Boorman Johnston & Co. an order on Messrs. M. K. Jessup & Co., at New York, therefor, for the purpose hereinbefore mentioned.

Whereas by resolutions adopted by this board on the third March, 1859, this company authorized and directed two hundred and eighty of the first mortgage bonds of this company for one thousand dollars each, which had been theretofore lodged with M. K. Jessup & Co., of New York, to be transferred and delivered to J. Boorman Johnston & Co., of New York, as agents
208 of Bailey Bros. & Co., of Liverpool, as additional collateral security for the payment of the indebtedness of this company to said Bailey Bros. & Co., which said indebtedness is now partially in judgment and partially on suit in the district court of the United States for the district of Wisconsin.

And whereas the said J. Boorman Johnston & Co., as such agents, are, as is represented, about to assign said indebtedness to certain parties in Wisconsin: Therefore—

Resolved, That the said J. Boorman Johnston & Co. be, and they are hereby, authorized and empowered to transfer and deliver to any assignee or assignees of such indebtedness all the first mortgage bonds of this company, which are held by them as collateral to said indebtedness, including the said 280 bonds received or to be received by them from said M. K. Jessup & Co., under the authority aforesaid, or that they may so transfer and deliver all of said bonds to such assignee or assignees to be held by him or them as collateral security to said indebtedness, as fully and effectually, and to all intents and purposes, as the said J. Boorman Johnston & Co. might or could hold the same, but for such assignment, transfer, and deliver.

SCHEDULE "F."

Resolved, That the contracts, correspondence, and papers accompanying the report of C. R. Alton, president, relating to the purchase of 4,000 tons of iron rails from C. B. Raymond & Co., of New York, and of five locomotives from the Boston Locomotive Works, and the acts of said Alton in re-
209 lation thereto be, and the same are hereby, approved, ratified, and confirmed, and the secretary is hereby directed to enter said papers of record.

The contracts, correspondence, and papers referred to in the foregoing resolutions are as follows, to wit:

1st. This memorandum of an agreement made this fourth day of December, A. D. 1856, by and between Bailey Brothers & Company, of Liverpool, G. B., by their agents, C. B. Raymond & Co, of the the city of New York, of the first part, and the Milwaukee and Superior Railroad Company, a corporation duly established by a law of the State of Wisconsin, by their president, C. R. Alton, of the second part, witnesseth, that said Bailey Brothers & Co., by their agents, C. B. Raymond & Co. as aforesaid, have this day sold and agreed to deliver to said Milwaukee and Superior Railroad Company four thousand tons of iron rails of a T pattern, so called, to weigh about fifty-six pounds per lineal yard, pattern same as that furnished by said Bailey Brothers & Company to the Racine and Mississippi Railroad Company, ninety per cent. of entire quantity to be eighteen feet long, and remaining ten per cent. in length not less than twelve and a half feet long, to be solid bars, cut square at both ends, of good merchantable quality, in material and workmanship. Said Bailey Brothers & Company agree to ship said four thousand tons of iron rails on board vessels in Great Britain,
210 bound to sail for the port of New York. Said shipment to be made in the months of April and May next.

In consideration of which aforesaid undertaking by said Bailey Brothers & Company said Milwaukee and Superior Railroad Company agree to receive said iron rails on arrival at said port of New York, and then and there to pay said C. B. Raymond & Company per each and every ton of said rails so received fifty dollars per ton at most; that is to say, for the rails free on board ships at ports of shipment, insurance and freights to said port of New York included, said railroad company agree to enter said rails at custom-house and account for the duties thereon in addition to said price of fifty dollars per ton at most. Said fifty dollars per ton at most shall be paid to said C. B. Raymond & Company in maner following:

In cash for amount of freight on each parcel or cargo, balance in notes of said railroad company, made payable in the city of New York to the order of their treasurer, and by him endorsed at six, nine, and twelve months equal amounts with interest at rate of seven per cent. added. Said notes to be endorsed by C. R. Alton, Edward Button, and D. P. Hull, or others in responsibility satisfactory to said C. B. Raymond & Company. With said notes so endorsed shall be lodged the first mortgage eight per cent.
211 bonds of said railroad company with said C. B. Raymond & Company at fifty per cent., that is for every dollar in notes, two dollars in bonds. It being expressly agreed that in case of default in payment of any of said notes, said C. B. Raymond & Company have the right and are hereby authorized without notice to said railroad company, and apply the proceeds to said default; said payments in cash and notes, and said deposite of bonds to be made for each parcel or cargo on arrival at said port of New York; the notes to date from said arrivals, and all settlements or payments to be made in the city of New York.

It is mutually agreed that not withstanding said railroad company pay freight and provide for duties on said iron rails, and have nominal possession for custom-house purposes that actual possession remains with said C. B. Raymond & Company through their trustee, Morris K. Jessup, until said rails are laid down on the road of said railroad company. This provision is made to retain the iron as security to said C. B. Raymond & Company until it is actually laid down on the road by said company.

It is further mutually agreed that Bailey Brothers & Company shall not be held responsible for any delays, may arise from the loss, capture, or casualty at sea, to any parcel or cargo of said rails, or in consequence of any war that may exist, or prospects of war at times of shipments, or in
212 consequence of strikes of workmen, and they shall not be bound to replace any parcel or cargo lost or missing at sea, unless notified in writing by said railroad company. Said notice to be given immediately after such losses ascertained; and upon receipt of said notice said Bailey Brothers & Company shall proceed to reship as soon as practicable for them so to do.

In witness whereof, the parties hereto have interchangeably set their hands and seals this fourth day of December, A. D. 1856.

(Signed) BAILEY BROTHERS & CO.,
Per C. B. RAYMOND & CO., *Ag'ts.*

(Signed) MILWAUKEE AND SUPERIOR RR. CO.,
By C. R. ALTON, *President.*

SCHEDULE "G."

OFFICE BOSTON LOCOMOTIVE WORKS, *Boston, December* 12, 1856.

C. R. Alton, pres't Milwaukee and Superior RR. Co., at Lafarge Hotel, New York:

DEAR SIR: We would hereby propose to build for the Milwaukee and Su-

perior RR. Co. five locomotive engines of the same capacity and description as those recently built by us for the Chicago, St Paul, and Fond du Lac RR. Co., general demensions as follows, viz:

Cylinders, 15 in cal., 24 in stroke, 5 feet dia. driving wheels ;
213 boiler to contain 14, afloat 11 feet 2 in., 8 wh. tender, with tank of 1,800 gal's capacity, and all fixtures to make the engines and tenders complete; all warranted to be made of good stock, and built in a thorough and workmanlike manner; to be delivered at Buffalo, N. Y., one the first of July, one the first of August, one the first of September, one the first of October, one the first of November, one the first of December, 1857, payment to be made in the railroad company's notes on nine and twelve months, dated at the time of the delivery of the machines at Buffalo, with interest added, the rate of seven per cent. per annum. The price of each engine, with the tender, to be nine thousand dollars. As collateral for the payment of the notes the railroad company to place in our hands farm mortgages taken on the line of the Milwaukee and Superior railroad, with ten year eight per cent. bonds of said railroad company attached, the bonds to be taken at seventy-five per cent.; we having the right to dispose of the said collaterals if the notes should not be paid at maturity.

Yours truly,

(Signed) HOLMES HINCKLEY.

SCHEDULE H.

214 Holmes Hinckley, esq., pres't Boston Locomotive Works:

DEAR SIR: We accept the proposition made in your letter of the 12th Dec'r to furnish our Milwaukee and Superior railroad five engines on the terms and conditions therein named. I will endeavor to be in Boston in two or three days, but cannot state definitely the day. Will you have the contract drawn in duplicate and hand them to Mr. Lovell, who can send or bring them to me if circumstances should prevent my visiting Boston.

Will you advise me on receipt of this. Address as before, at Lafarge Hotel. Very truly, your ob't serv't,

C. R. ALTON,
Pres't Milwaukee and Superior RR. Co.

SCHEDULE "I."

An election for seven directors of the Milwaukee and Superior Railroad Company will be held at the Milwaukee City Bank on Saturday, April 5th, 1856, at 10 o'clock a. m.

Milwaukee, March 22nd, 1856.

GEORGE REED.
C. R. ALTON.
D. P. HULL.
H. HAERTEL.
E. BUTTON.
JULIUS WHITE.
TIMOTHY O'HOWE.
CHARLES H. WHEELER.
215 J. N. CORDES.
A. L. McCREA.
JOHN FURLONG.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Jas. Lathrop, being duly sworn, says he is clerk in the office of the

"Wisconsin," a newspaper published in the city of Milwaukee, in said county; that a notice, of which the one hereunto annexed is a true copy, was duly published in said newspaper ten days successively, commencing on the 24th day of March, A. D. 1856.

JAS. LATHROP.

Subscribed and sworn to this 5th day of April, A. D. 1856, before me:
ALBERT SMITH, *Justice of the Peace.*

Pursuant to the above notice a meeting of the stockholders of said company was held on Saturday, the 5th day of April, 1856, at 10 o'clock a. m., at the Milwaukee City Bank.

On motion, C. R. Alton was elected chairman, Joshua Stark, was elected secretary.

On motion of Mr. Button, the meeting proceeded to the election of directors by ballot. Messrs. Button and Haertel acting as tellers, and the ballots *and the ballots* being counted it was found that—

Herman Haertel had received eleven hundred votes.
David P. Hull " "
C. R. Alton " "
216 Julius White " "
Josua Stark " "
George Reed " "

And thereupon the said Herman Haertel, Edward Button, David P. Hull, (Edward,) C. R. Alton, Julius White, Joshua Stark, and George Reed were declared duly elected directors of the said company until the next annual election of directors, and thereupon the meeting adjourned sine die.

C. R. ALTON, *Chairman.*

J. STARK, *Secretary pro tem.*

U. S. AMERICA, *District of Wisconsin, ss:*

This is to certify that the foregoing are the depositions of the witness taken on behalf of the complainants in the cause entitled in the caption thereof, and of the schedules therein referred to, taken pursuant to the order annexed thereto, dated Oct'r 6th, 1862.

Witness my hand, this 10th Sept., 1863, at the city of Milwaukee.

FRANCIS BLOODGOOD,
Court Com'r, Dis. Wis.

217 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

[L. S.] The President of the United States of America to William Emmerson, esq., New York City, greeting:

Know ye that, in confidence of your prudence and fidelity, you have been appointed, and by these presents you, or any one or more of you, are invested with full power and authority to examine James B. Johnston, Adam Norrie, Charles H. Bergman, Isaac H. Knox, Gordon Norrie, David D. Williamson, George F. Fetch, Morris K. Jessup, Curtis B. Raymond, John P. Kennedy, and John Lord, on their corporal oaths, as witnesses in a cause depending in the district court of the United States for the district of Wisconsin, wherein G. P. Drury and William Page, assignees of the Boston Locomotive Works, are complainants, and the Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott are defendants, on the part of the complainants upon the interrogatories annexed to this commission, and therefore you are

hereby commanded that you, or any one or more of you, at certain days and places to be appointed by you for that purpose, do cause the said James B. Johnston, Adam Norrie, Charles H. Bergman, Isaac H. Knox, Gordon Norrie, David D. Williamson, George F. Fetch, Morris K. Jessup, Curtis B. Raymond, John P. Kennedy, John Lord, to come before you, and then and there examine them on oath upon the said interrogatories, and that you take such examination and reduce the same into writing, and return the same annexed to this writ, closed up under your seal, or the seals of any one or more of you, into the said district court of the United States before the judge thereof, with all convenient speed.

Witness the Honorable Andrew G. Miller, judge of the district court of the United States of America for the district of Wisconsin aforesaid, at the city of Milwaukee, in said district, this twentieth day of May, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

J. M. MILLER, *Clerk.*

218 The execution of the within writ appears by certain schedules hereunto annexed.

New York, July 26, 1862.

WM. EMERSON, *Commissioner.*

218½ *Rules.*

On the receipt of the commission made out as aforesaid, by any one of the commissioners named, he shall give notice to the other commissioners named therein, of the time and place of taking the depositions, if possible, and if any of the commissioners are absent at the execution of said commission, any one or more present may proceed to execute the same, (unless otherwise expressly directed therein,) as if all were present; but they must certify that those absent have been duly served with notice of the time and place of executing said commission, or the reasons for their not being so notified.

The persons to whom such commission shall be directed, or any one or more of them, unless otherwise expressly directed therein, shall execute the same as follows:

First. They or any of them shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses to the interrogatories proposed to them shall be the truth, the whole truth and nothing but the truth.

Second. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him, and certified by such of the commissioners as are present at the taking of the same.

Third. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall, in like manner, be subscribed by the witness proving the same. (This section must be understood to refer to such papers as can be produced upon the examination.) If the paper referred to be a record not subject to the control of the party or the commissioners, it will be sufficient to annex a copy, and the original may be produced on the trial, separate from the commission.

Fourth. The commissioner or commissioners shall subscribe each sheet of the depositions, and annex all the depositions and exhibits to the commissions upon which the return shall be endorsed, and shall close them up under their or his seals, and shall address the same, when so closed, to the clerk of the court from which the commission issued, at his place of residence, with the style of the suit.

Fifth. If there is or is not a direction on the commission to return the same by mail, they, or he, shall immediately deposit the packet, so directed, in the nearest post office.

Sixth. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet, so directed, shall be delivered to said agent.

219 District court of the United States for the district of Wisconsin, in equity.

G. P. Drury and William Page, assignees of the Boston Locomotive Works,
vs.
The Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

Interrogatories to be propounded to James B. Johnston, Adam Norrie, Charles H. Bergman, Isaac H. Knox, Gordon Norrie, Dowd D. Williamson, George F. Fitch, Morris K. Jessup, Curtis B. Raymond, John P. Kennedy, and John Lord, witnesses to be produced, sworn, and examined on the part and behalf of G. P. Drury and William Page, assignees of the Boston Locomotive Works, plaintiffs in a certain cause now pending against Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, defendants, in the district court of the United States for the district of Wisconsin, in equity, before the judge thereof, before William Emmerson, esq., of the city of New York, under and by virtue of a commission hereto annexed.

First. Do you know the parties, plaintiffs and defendants, in the title of these interrogatories named, or either, and which, of them, and how long have you known them, or either, and which of them? Declare.

Second interrogatory. Do you know C. R. Alton, Herman Haertel, Edward Button, and David P. Hull, or either, and which, of them, and how long have you known them, or either, and which of them? Declare.

220 Third interrogatory. Do you know a firm in Liverpool, England, of the name and style of Baily & Brothers? If yea, how long have you known said firm, and what is, and what has been, the general business of said firm within the several years last past, and of how many members was said firm composed, and what was the full name of each member of said firm; and did said firm have any business agent or agents in the city, county, and State of New York, during the years 1856, 1857, 1858, 1859, and 1860, or in either, and which, of those years, and who was, or were, such agent or agents?

Fourth interrogatory. Do you know anything, and what, of the firm of Bayleys & Brothers selling and delivering any, and how much, railroad iron to the Milwaukee and Superior Railroad Company? If yea, how much railroad iron was so sold and delivered to said railroad company, and at what price, and who transacted said business on behalf of said Bayleys & Brothers, and who in behalf of said railroad company, and was payment for said iron made or secured to be made by notes, bonds, or how otherwise? If you answer that notes were given, state how many, and the amount of each, when and where payable, and who was the maker of said notes, and were the same endorsed by any person or persons, and whom, and were such notes given pursuant to any, and what agreement, and was the payment of said notes secured by any, and what, collaterals? Answer fully all you know upon this subject.

221 Fifth interrogatory. If, in answer to the fourth direct interrogatory, you state that notes were given for the payment or to secure the payment for said railroad iron sold and delivered by Bailey & Brothers to the Milwaukee and Superior Railroad Company, were said notes, or any or either of them, paid at maturity, or at any time, and when, and by whom; and was any and how much of the iron so sold and delivered to said railroad company at any, and what, time returned to said Bailey & Brothers, or to any one, and whom, for said Bailey & Brothers; and was there any, and what, arrangement or agreement entered into concerning the return of such iron, and concerning such notes, or either, and which; and by and between whom was such arrangement or agreement, if any, made; and what, if anything, was done in pursuance of such arrangement or agreement? State fully and at large what you know upon this subject.

Sixth interrogatory. If, in answer to the fourth direct interrogatory, you state that notes were given for the payment, or to secure payment, for railroad iron sold and delivered by Bailey & Brothers to the Milwaukee and Superior Railroad Company, state whether any, and how many, were delivered up or cancelled by Bailey & Brothers, and upon what, if any, consideration this was done, and what individuals were parties to that transaction. If you state that any of said notes were delivered up, to whom were they so delivered, and what was the aggregate amount of those retained, if any? and was there any, and what, new arrangement or agreement made as to the notes retained, if any were retained? and when did the matters, or any of the matters, inquired of in this interrogatory transpire? and was C.
222 R. Alton, Herman Haertel, Edward Button, and David P. Hull, or any, or either, and which, of them present at that time, or at those times? Answer fully.

Seventh interrogatory. Do you know anything, and what, of there being placed in hands or possession of Morris K. Jessup, or in the hands or possession of M. K. Jessup & Co., any and how many of the bonds of the Milwaukee and Superior Railroad Company? If you answer affirmatively, state for what sum each of said bonds were given, and under what circumstances, understanding, or agreement said bonds were so there placed; and for what, if any, use, trust, or purpose, and for and upon what, if any, consideration was this done, and what, if anything, did the person or persons who so held said bonds do therewith. Did he or they, at any, and what, time deliver them up, or dispose of them to any person or persons, body or bodies? and if so, upon whose request or direction, and for and upon what consideration, if any, were said bonds delivered up, or disposed of? and was the payment of those bonds secured by any, and what, mortgage? and if by mortgage or instrument in the nature of a mortgage, what property was mortgaged? and was such mortgage instrument the first or a subsequent one on the said mortgaged property? Answer fully.

Eighth interrogatory. If, in answer to the sixth direct interrogatory, you state that any of the notes given in payment, or to secure payment, for railroad iron sold to the Milwaukee and Superior Railroad Company
223 were retained, upon a return of a part of said sold and deliverd iron, state whether any suit was ever, and when, brought upon the said retained notes, against any of the parties to said notes; and if so, what parties, and when and in what court was such suit commenced; and pending such suit did the parties, or any of the parties to said notes, and who, request Bailey & Brothers, or their agent or agents, to foreclose any, and what, mortgage, given by said Milwaukee and Superior Railroad Company? and for what purpose was such request, if any, made? and what did Bailey & Brothers, or their agent or agents, and whom, consent or refuse to proceed to the foreclosure of such mortgage?

Ninth interrogatory. If, in answer to the seventh direct interrogatory, you state that a mortgage was given to secure the payment of bonds executed by the Milwaukee and Superior Railroad Company, state who was the mortgagee or trustee named in said mortgage instrument, and whether there was any arrangement or agreement made between said mortgagee or trustee, and the directors, or any, and which, of the directors of said Milwaukee and Superior Railroad Company, and endorsers, or any, and which, of the endorsers of the notes given for railroad iron to Bailey & Brothers concerning the foreclosure of said mortgage instrument. If yea, what was that arrangement or agreement, and who were the parties who made, assented, or consented to such agreement or arrangement? and was any attorney or solicitor, and who, agreed upon to control such foreclosure suit? and was the attorney or solicitor of record, or some other attorney or solicitor, and who, to control such foreclosure suit, and was such foreclosure suit commenced?

If yea, where, and in what conrt was the said suit commenced?

224 Tenth interrogatory. If, in answer to the seventh direct interrogatory, you state that there were placed in the hands or possession of Morris K. Jessup, or M. K. Jessup & Co., bonds, and that the same, or any part thereof, were delivered to Bailey & Brothers, or to some one for them, as an additional security for the payment of the sum of money due to them on the notes in their hands given for said railroad iron, state whether that was done without any previous request by, or consultation with, Bailey & Brothers, or their agent or agents; and at whose instance and request was this done? and for what purpose, or purposes, was or were these bonds so passed over to Bailey & Brothers, or to their agent or agents? and had the discharge of the endorsers of said notes anything, and what, to do with this arrangement of passing those bonds in the hands of Morris K. Jessup, or M. K. Jessup & Co., to Bailey & Brothers, or their agent or agents? and had the increase of dividend to Bailey & Brothers, of the money which might be realized by a sale of the property mortgaged by the aforesaid mortgage, anything, and what, to do with the arrangement of passing to Bailey & Brothers, or to their agent or agents, the bonds which had been placed in the hands or possession of Morris K. Jessup, or M. K. Jessup & Co.?

Eleventh interrogatory. If, in answer to the seventh direct interrogatory, you state that bonds were passed over to Bailey & Brothers, or to their agent or agents, which had been previously placed in the hands or possession of Morris K. Jessup, or M. K. Jessup & Co., state whether, before the bonds were so passed, and when, there was any, and what, agreement made between the defendants James B. Cross, James Ludington, and Samuel

225 B. Scott, or either, and which, of them, and the directors of the Milwaukee and Superior Railroad Company, and the endorsers of the said notes given for railroad iron, or any, and which, of said directors and endorsers, as to the purchase by said Cross, Ludington, and Scott, or either of them, of the said indebtedness to said Bailey & Brothers, and the discharge of the said endorsers from their, or any of their, liability as endorsers, in case the said endorsers and directors, or any, and which, of them, would secure to them, or to any, and which, of them, the premises mortgaged by the said mortgage executed by the said Milwaukee and Superior Railroad Company, freed from all liens and incumbrances, and also secure to said Cross, Ludington, and Scott, or to some of them, a perfect title to any, and what, number of the bonds issued by the aforesaid railroad company, which were secured to be paid by the mortgage of said railroad company; and was this agreement carried out, and was any, and what, judgment assigned, or in any, and what, manner transferred to said Cross, Ludington, and Scott, or to either, and which, of them? and were any, and what, bonds, and to what number and amount, assigned, or in any, and what, manner transferred to said Cross,

Ludington, and Scott, or to any, and which, of them? and what sum or consideration, if any, was paid by said Cross, Ludington, and Scott, or by any, and which, of them, for the said judgment and bonds, or for either, and which, of them? and when was such consideration paid, if at all? and when was such assignments or transfers made? Answer fully all you know as to the subject inquired of in this interrogatory.

226 Twelfth interrogatory. Was the mortgage made by the Milwaukee and Superior Railroad Company to secure, among other things, the bonds which were given as collateral security for the payment of the notes given by said railroad company for railroad iron to Bailey & Brothers, or to some one for them, proceeded into final foreclosure decree? If yea, what number of bonds were held by Bailey & Brothers, or by some other for them, as collateral, to secure the payment of the notes held by Bailey & Brothers at the time such final decree was rendered? and what was the aggregate amount of said bonds so then held by said Bailey & Brothers? and at the time of the rendition of said decree had Bailey & Brothers consented or agreed to take, for any, and what, purpose, the bonds, or any, and how many, of the bonds of the Milwaukee and Superior Railroad Company which had been placed in the hands or possession of Morris K. Jessup, or M. K. Jessup & Co.?

Thirteenth and last interrogatory. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matter in question in this cause? If yea, set forth the same fully and at large in your answer.

PRICHARD & JACKSON,
Sol's for Complainant.
J. H. KNOWLTON,
of Counsel.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, John M. Miller, clerk of the district court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their

227 respective originals now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this twelfth day of May, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

[L. S.]

J. M. MILLER, *Clerk.*

Endorsed: U. S. district court, Wisconsin. G. P. Drury and William Page, assignee, &c., *vs.* the Milwaukee and Superior Railroad Company *et als.* Commission.

Depositions of witnesses, taken at the city of New York, under and by virtue of the commission hereto prefixed.

Douw D. Williamson, a witness produced, sworn, and examined under the commission above mentioned, being examined upon the interrogatories to said commission annexed, deposes as follows:

1. To the first interrogatory he says: I do not know any of the parties, plaintiffs or defendants, in the title of these interrogatories named, or either of them.

2. To the second interrogatory he says: I know Mr. C. R. Alton, and have

known him since the 31st of July, 1856. I do not know either of the other persons enquired of.

3. To the third interrogatory he says: I do not know the firm of Bailey & Brothers, nor any member thereof, nor do I know any other matter herein enquired of.

4. To the fourth interrogatory he says: I do not know.

5. To the fifth interrogatory he says: I do not know.

6. To the sixth interrogatory he says: I do not know.

228 7. To the 7th interrogatory he says: I was on the first day of January, 1857, and have ever since been, president of the Farmers' Loan and Trust Company, in this city, and as such president I became, in behalf of said company, a party to a certain mortgage of the date last mentioned executed to said company by the Milwaukee and Superior Railroad Company. By virtue of said mortgage, I was authorized to sign certain bonds for said last-mentioned company, and I did accordingly, on the 2d day of February, 1857, sign one hundred of such bonds and delivered the same to Mr. C. R. Alton, then president of said company, and on the 17th day of April, 1857, I signed four hundred and fifty additional bonds under the same authority, and delivered the same, by the verbal order of said Alton, as such president, to M. K. Jessup & Co., a financial firm then doing business in this city. Each of said bonds was for the sum of one thousand dollars. I do not know anything of the other matters inquired of in this interrogatory, except that the payment of said bonds was understood by me to be secured by said mortgage, which I received as a first mortgage upon the property of said railroad and believe to have been such. The original mortgage is still in my hands, and I now produce and exhibit the same to the commissioner, but I cannot part with it, and I therefore annex a copy of it to this deposition, marked "A."

8. To the eighth interrogatory he says: I do not know anything of the matter herein inquired of.

9. To the ninth interrogatory he says: The Farmers' Loan and
229 Trust Company was the mortgagee or trustee named in said mortgage. There was no arrangement or agreement made between said mortgagee or trustee and the directors of said Milwaukee and Superior Railroad Company, or any of them, or any of the endorsers of notes given to Bailey & Brothers concerning the foreclosure of said mortgage.

10. To the tenth interrogatory he says: I know nothing concerning the matters herein inquired of.

11. To the eleventh interrogatory he says; I do not know anything of the matters herein enquired of.

12. To the twelfth interrogatory he says: The mortgage mentioned in my answer to the seventh foregoing interrogatory was foreclosed, and a final decree of foreclosure was obtained in the district court of the United States for the district of Wisconsin on the 19th day of March, 1859, as I was informed and believe. I do not know anything more of the matters herein inquired of.

13. To the thirteenth interrogatory he says: I do not know any other matter or thing likely to be of benefit or advantage to the parties at issue in this cause, or either of them.

D. D. WILLIAMSON.

Taken, sworn, and examined this 29th day of May, 1862, before me.
WM. EMERSON, *Commissioner.*

Isaac H. Knox, a witness produced, sworn, and examined at the city of New York under and by virtue of the foregoing commission, being examined upon the interrogatories to said commission annexed, deposes as follows:

1. To the first interrogatory he says: I do not know the parties,
230 plaintiffs and defendants, in the title of these interrogatories named, nor either of them.

2. To the second interrogatory he says: I do not know either of the persons herein named.

3. To the third interrogatory he says: I do not know any firm in Liverpool of the name of Bailey & Brothers; I am acquainted with a firm of that place of the name and style of Bailey Brothers & Co. I have been a member of the firm of Boorman Johnston & Co., of this city, since the 1st of November, 1855, and during all that period my firm has had an active correspondence with Bailey Brothers & Co. I have occasionally addressed letters to them on behalf of my firm, and the correspondence with them has been entirely under my charge since May, 1861, but I have no personal knowledge of the members of said firm of Bailey Brothers & Co. Said firm's business within the seven years last past has been the iron commission business. About seven years ago said firm was composed of five persons, namely, Joseph Bailey, (who died in 1859,) Crawshay Bailey, William Latham Bailey, Henry Bailey, and Alfred Radcliffe. During the whole of the year 1856 and until the autumn of 1857, the agents of said firm in the city of New York were C. B. Raymond & Co. Since the autumn of 1857 Mr. John Lord has been acting for Bailey Brothers & Co. in the city of New York under a power of attorney. The said firm has been continued by the surviving partners under the same name ever since the death of Joseph Bailey.

4. To the fourth interrogatory he says: My firm, in the beginning
231 of 1858, received from Bailey Brothers & Co. the copy of a contract, dated the fourth day of December, A. D. 1856, which paper I now produce to the commissioner and annex a copy thereof to my deposition, marked "B." We were informed by Messrs. Bailey Brothers & Co. that under said contract they had sold a quantity of iron to the Milwaukee and Superior Railroad Company, and they also sent to us, in the course of 1856, certain promissory notes, which they informed us had been received pursuant to said contract in payment for the iron furnished by Bailey Brothers & Co. Said notes were as follows:

One	due April 26, 1858, for	.....	$5,478	14
One	" May 31, "	.....	1,124	27
One	" July 26, "	.....	5,478	14
One	" Aug't 31, "	.....	1,124	27
One	" July 26, "	.....	916	76
One	" Oct. 26, "	.....	5,478	14
One	" Dec. 1, "	.....	1,124	27
	Amounting altogether to	.....	20,723	99

Said notes were all made by the Milwaukee and Superior Railroad Company, payable to and endorsed by C. R. Alton, H. Haertel, Edward Button, and D. H. Hull. The notes were all payable in the city of New York, and their payment was secured by forty-two first mortgage bonds of said railroad company for one thousand dollars each, as collateral. I have reason to know that said notes were genuine, because my firm obtained judgment upon them, and *and* afterwards assigned the judgment for a valuable consideration. This is all I personally know of the matters herein enquired of.

5. To the fifth interrogatory he says: I have no personal knowledge
232 of the matters enquired of in this interrogatory, except so far as I have already stated in my answer to the last foregoing interrogatory, to which I refer.

6. To the sixth interrogatory he says: I have no personal knowledge of any of the matters enquired of herein.

7. To the seventh interrogatory he says: In or about the month of May, 1859, my firm received from M. K. Jessup & Co. a sealed parcel, represented by them to contain certain bonds of the Milwaukee and Superior Railroad Company, and which they delivered to us pursuant to a resolution of that company of March 3, 1859. We sent this sealed parcel at once, without opening it, by express, to Emmons & Van Dyck, our attorneys at Milwaukee. I know nothing else of the matters and things inquired of.

8. To the eighth interrogatory he says: My firm gave directions to Emmons & Van Dyck, our attorneys at Milwaukee, to commence proceedings in the U. S. district court for Wisconsin on the notes which were sent to us by Bailey Brothers & Co. against all the parties to said notes. Through our attorneys in Milwaukee, our firm, as the agents of Bailey Brothers & Co., were requested to procure the foreclosure of the mortgage given by the Milwaukee and Superior Railroad Company to the Farmers' Loan and Trust Company as security for the payment of their bonds. I do not know at whose instance nor for what purpose the request was made. We thereupon applied to the Farmers' Loan and Trust Company and requested them to foreclose the mortgage. They declined to do so, but said that we might use their name in such foreclosure, if we pleased. I communicated this answer to our attorneys
233 in Milwaukee, but do not know what was done thereupon.

9. To the ninth interrogatory he says: I do not know anything of the matters herein enquired of.

10. To the tenth interrogatory he says: I do not know anything of the matters herein enquired of.

11. To the eleventh interrogatory he says: My firm, on the 5th day of May, 1859, assigned to James B. Cross, of Milwaukee, all the judgments which we had obtained on account of Bailey Brothers & Co. for the sum of thirteen thousand three hundred and eighty dollars and 20 cents. I refer for all particulars to the original assignment, which is doubtless on record. We received payment in cash, but I am not sure it was exactly the sum above named. Our assignment transferred the collateral securities, together with the judgments against all the parties. I have no personal knowledge of any other matter herein inquired of.

12. To the twelfth interrogatory he says: I do not know anything of the matters herein inquired of.

13. To the thirteenth interrogatory he says: I do not know any other matter or thing which, in my judgment, may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this my examination on the matters in question in this cause.

ISAAC H. KNOX.

Taken and examined and by the said witness sworn to and subscribed this 19th day of June, 1862, before me.

WM. EMERSON, *Commissioner.*

234 Morris K. Jessup, a witness produced, sworn, and examined under the foregoing commission, being examined upon the interrogatories to said commission annexed, deposes as follows:

1. To the first interrogatory he says: I do not know the parties named in the title of these interrogatories, nor either of them.

2. To the second interrogatory he says: I know Mr. C. R. Alton, and have known him for five or six years. I do not know either of the other persons herein inquired of.

3. To the third interrogatory he says: I know a firm in Liverpool of the name and style of Bailey Brothers & Co., and have known them since 1859, in which year I visited England and became personally acquainted with two members of said firm, young Mr. Bailey and young Mr. Radcliffe. The general business of said firm for several years past has been that of iron merchants, but I do not know for how many years, nor of whom said firm was composed, nor the full name of any member thereof. Said firm had an agency in the city of New York during the years 1856, 1857, and 1858, and the agents were Raymond & Fullerton, and afterwards C. B. Raymond & Co., but when the one firm ceased and the other began I do not know. Latterly Boorman Johnston & Co. have been the agents here of Bailey Brothers & Co.

4. To the fourth interrogatory he says: My firm of M. K. Jessup & Co., on or about the 4th of December, 1856, acted as brokers in effecting a contract between Bailey Brothers & Co. on the one part, by their agents, C. B.
235 Raymond & Co., and the Milwaukee and Superior Railroad Company on the other part, for the sale and purchase of a quantity of iron. A contract was written out in duplicate, as I believe, one of which was passed to each party. Neither is in my possession. All I have is a note of said contract, which was entered on our books. A copy of this note is now produced to the commissioner and annexed to my deposition, marked "C." C. B. Raymond & Co. transacted said business on behalf of Bailey Brothers & Co., and my firm on behalf of said railroad company. I have no personal knowledge of any other matter inquired of in this interrogatory.

5. To the fifth interrogatory he says: I have no personal knowledge of any of the matters herein inquired of.

6. To the sixth interrogatory he says: I have no personal knowledge of the matters herein inquired of.

7. To the seventh interrogatory he says: It is my impression that one hundred and thirty-three bonds of the Milwaukee and Superior Railroad Company were placed in our hands for one thousand dollars each; I think that these bonds were placed in our hands to be delivered to C. B. Raymond & Co. as collateral security for the iron purchased of their principals under the contract mentioned in my answer to the fourth interrogatory, and to the best of my knowledge and belief the bonds were so delivered by us; I understood that the payment of said bonds was secured by a first mortgage on the property of said railroad company. I do not know anything more of the matters inquired of in this interrogatory.

8. To the eighth interrogatory he says: I do not know anything of the matters inquired of in this interrogatory.

9. To the ninth interrogatory he says: I do not know anything of the matters herein inquired of.

236 10. To the tenth interrogatory he says: The bonds were passed over to Bailey Brothers & Co., or their agents, as I believe, on the request of the Milwaukee and Superior Railroad Company, and for the purpose of giving Bailey Brothers & Co. collateral security for the iron sold by them as above mentioned. Further than this I have no knowledge of the matters inquired of herein.

11. To the eleventh interrogatory he says: I know nothing of the matters herein inquired of.

12. To the twelfth interrogatory he says: I know nothing of the matters herein inquired of.

13. To the thirteenth interrogatory he says: I do not know any other matter or thing, besides what I have stated in my foregoing answers, which can

be a benefit or advantage to the parties at issue in this cause, or either of them, or that can be material to the subject of this my examination.

MORRIS K. JESSUP.

Taken, sworn, and examined, and by the said witness subscribed, this 20th day of June, 1862, before me.

WM. EMERSON, *Commissioner.*

John Lord, a witness, produced, sworn, and examined, at the city of New York, being interrogated under the commission hereto prefixed, deposes as follows:

1. To the first interrogatory, annexed to said commission, he says: I do not know the parties, plaintiffs or defendants, in the title of these interrogatories named, nor either of them, except that I know there was such a company as is named as defendant.

237 2. To the second interrogatory he says: In the year 1858 I had some personal interviews with Mr. C. R. Alton and Mr. Herman Haertel, but since that time I have not known them, nor have I any personal knowledge of either of the other persons herein named.

3. To the third interrogatory he says: I do not know any firm in Liverpool, England, by the name of Bailey & Brothers, but I have for many years past known a firm in that place by the name and style of Bailey Brothers & Co.; their general business for many years past has been that of iron merchants; the firm in 1856 was composed of the following persons: Sir Joseph Bailey, bart.; Crawshay Bailey, Henry Bailey, William Latham Bailey, and Alfred Radcliffe, and is still composed of persons of the same names, though in the interim the first-named persons died, and has been succeeded by another of the same name. In 1856 and 1857 C. B. Raymond & Co. were the agents, in the city of New York, for Bailey Brothers & Co.; since that time Messrs. J. Boorman Johnston & Co. have been their general agents here, and I have been their special agent and attorney.

4. To the fourth interrogatory he says: In 1856 and 1857 I was in Liverpool with the firm of Bailey Brothers & Co., and know that said firm received from C. B. Raymond & Co. a paper, of which a copy is annexed hereto by Mr. Knox and referred to in his deposition as Schedule B; that paper shows the terms of the contract with the Milwaukee and Superior Railroad Company. By the correspondence of Bailey Brothers & Co., which was open to my inspection, and by the notes of the railroad company and the col-

238 lateral securities which have been in my hands, I know that the said firm delivered between one thousand and two thousand tons of railroad iron to said railroad company at the price named in said Schedule B. C. B. Raymond & Co. transacted said business on behalf of said firm, and M. K. Jessup & Co. on behalf of said railroad company. Payment for said iron was made in promissory notes of said railroad company, with collaterals as agreed; I do not remember the precise number, but remember that the amount was about $20,000. This is all I know of the matters herein inquired of.

5. To the fifth interrogatory he says: None of said notes were paid at maturity; the agents of said firm of Bailey Brothers & Co. were obliged to get judgments against the said railroad company, and afterwards sold and assigned said judgments to other parties for a valuable consideration. I do not personally know of any of said iron having been returned by the company to said firm or to any one for them. I think there was an arrangement made between the company and said firm for cancelling the contract, but if made, such arrangement was made by C. B. Raymond & Co. on the part of said firm.

6. To the sixth interrogatory he says: The notes of said railroad company

were received by or for Bailey Brothers & Co., except for iron actually delivered. The notes received by them were sued upon and the judgments assigned as I have mentioned in my last foregoing answer, to which I refer.

7. To the seventh interrogatory he says: I cannot answer as to the matters inquired of in this interrogatory for want of personal knowledge.

239 8. To the eighth interrogatory he says: I refer for all the knowledge I have of the matters inquired of herein, to my answer to the fifth interrogatory.

9. To the ninth interrogatory he says: I cannot answer this interrogatory for want of personal knowledge of the matters herein inquired of.

10. To the tenth interrogatory he says: I cannot answer this interrogatory for want of personal knowledge of the matters therein inquired of.

11. To the eleventh interrogatory he says: I do not know anything of the matters herein inquired of, except so far as I have already stated in my answer to the foregoing fifth interrogatory, to which answer I refer.

12. To the twelfth interrogatory he says: I cannot answer this interrogatory for want of personal knowledge of the matters herein inquired of.

13. So the thirteenth interrogatory he says: I do not know any other matter or thing that may be, in my judgment, a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this my examination or the matters in question in this cause, for the reason that I do not know what those matters in question are.

JOHN LORD.

Taken, sworn, and examined, and by the said witness, John Lord, subscribed this 7th day of July, 1862, before me.

WM. EMERSON, *Commissioner.*

John S. Kennedy, a witness, produced, sworn, and examined, at the city of New York, under and by virtue of the commission hereunto prefixed, in answer to the interrogatories thereto annexed, deposes as follows:

1. To the first interrogatory he says: I know of the existence of

240 the corporation named in the title of these interrogatories, but I do not know the persons therein named, or either of them.

2. To the second interrogatory he says: I know C. R. Alton, and have known him since the early part of 1857; I think I had a slight acquaintance with Herman Haertel in the early part of 1858; I do not know Edward Button or David P. Hull.

3. To the third interrogatory he says: I have known by reputation a firm in Liverpool, England, of the name of Bailey Brothers & Co., whose general business was that of iron merchants, but I have no personal acquaintance with the members of the firm, nor have I had any direct communication with them; I know that said firm has had business agent or agents in the city of New York during each of the years inquired of; I believe that C. B. Raymond & Co. were such agents during 1856, 1857, and, perhaps, till the early part of 1858, and since that time John Lord has been their general agent here.

4. To the fourth interrogatory he says: I arrived in the United States from England about the end of December, 1856, and became a member of the firm of M. K. Jesup & Co. in the month of May, 1857. In consequence of my becoming a member of that firm I became acquainted with the fact that C. B. Raymond & Co., as agents of Bailey Brothers & Co., had in the latter part of 1856 made a contract with the Milwaukee and Superior Railroad Company for the sale and delivery of 4,000 tons of railroad iron. I do not know how much

241 iron was delivered to said railroad company under the contract; the price was $50 per ton; payment was made in the promissory notes of

said railroad company, indorsed by certain parties, of whom C. R. Alton was one, and secured by first mortgage bonds of the railroad company. The business was transacted on behalf of Bailey Brothers & Co. by C. B. Raymond & Co., and by the firm of M. K. Jesup & Co. on behalf of the railroad company; I do not remember how many notes were given nor the amount of each, nor when and where payable. The maker of the notes given was the railroad company, and they were indorsed as already mentioned. Said notes were given pursuant to an agreement made between the parties before I joined the firm of M. K. Jesup & Co., and the payment was secured by the collaterals I mentioned above.

5. To the fifth interrogatory he says: I believe that none of said promissory notes were paid at maturity, but all were protested for non-payment, and I do not know whether or not they were ever paid. I think that a portion of said iron was, about the fall of the year 1857, returned to C. B. Raymond Co. as agents of Bailey Brothers & Co., but how much I cannot recollect. I think that an arrangement was made for the return of such portion of the iron and for the surrender of a corresponding portion of the promissory notes and collaterals, but I was at the west about the time of said arrangement. It is my impression that the arrangement was made between Mr. C. R. Alton, president of the railroad company, personally, and C. B. Raymond & Co. acting for Bailey Brothers & Co.

6. To the sixth interrogatory he says: I cannot add anything in answer hereto to what I have already said in my answer to the foregoing
242 fourth and fifth interrogatories, to which answers I refer.

7. To the seventh interrogatory he says: I recollect that a parcel of the bonds of the Milwaukee and Superior Railroad Company were deposited in the hands of Mr. M. K. Jesup or of M. K. Jesup & Co. for some purpose, but what number or to what amount or upon what precise trust or for what specific purposes, I cannot now recollect. I think that the bonds were for $1,000 each; that they were secured by a first mortgage on the railroad, and that they were transferred to J. Boorman Johnston & Co. by direction of the railroad company. I cannot answer this interrogatory more fully from want of recollection.

8. To the eighth interrogatory he says: I know nothing of the matters inquired of in this interrogatory.

9. To the ninth interrogatory he says: I know nothing of the matters inquired of in this interrogatory.

10. To the tenth interrogatory he says: I cannot add anything to what I have already said in my answer to the foregoing seventh interrogatory, to which answer I refer.

11. To the eleventh interrogatory he says: I know nothing of the matters inquired of in this interrogatory beyond what I have already said in my answer to the seventh interrogatory.

12. To the twelfth interrogatory he says: I know nothing of the matters herein inquired of.

13. To the thirteenth interrogatory he says: I do not know any other matter or thing besides what I have already stated in my foregoing answers which, in my judgment, would be a benefit or advantage to the parties at issue, or either of them, or that would be material to the subject of this my examination.

JOHN S. KENNEDY.

243 Taken, sworn, and examined, and by the said witness subscribed, this 26th day of July, 1862, before me.

WM. EMERSON, *Commissioner.*

Commissioner's fees	$30 00
Witnesses' fees	2 50
Copyist and postage	2 00
	34 50

A, Wm. Emerson, com'r.

This indenture, made the first day of January, in the year of our Lord one thousand eight hundred and fifty-seven, between the Milwaukee and Superior Railroad Company, a corporation duly constituted as such by the laws of the State of Wisconsin, parties of the first part, and the Farmers' Loan and Trust Company, of the city of New York, a corporation duly constituted as such by the laws of the State of New York, parties of the second part.

Whereas the parties of the first part, pursuant to the terms of the statute of said State of Wisconsin, incorporating them, and other statutes of said State affecting them, are engaged in constructing the first division of their railroad from the city of Milwaukee to the city of Green Bay, (both in the State of Wisconsin,) a distance of one hundred and twenty miles, and for that purpose in part have resolved to raise a sum of money by loan
244 for purchasing and transporting iron rails and machinery therefor, and for aiding the construction of said railroad, and in order to secure payment therefor, or payment thereof, have resolved to execute during the present year certain bonds, with interest warrants or coupons annexed, not exceeding five hundred and fifty thousand dollars in amount; and during the the year one thousand eight hundred and fifty-eight, certain other bonds, with interest warrants or coupons annexed, not exceeding six hundred and fifty-thousand dollars in amount, the total amount to be issued under this mortgage not to exceed twelve hundred thousand dollars, said bonds to be issued in amounts of one thousand dollars each, numbered, respectively, from one (1) to twelve hundred (1200) inclusive, to the person or persons lending such money or furnishing such rails or machinery, and made payable in the city of New York, on the first day of January, in the year of our Lord one thousand eight hundred seventy-seven, and bearing interest from their date at the rate of eight per centum per annum, payable semi-annually, on the first days of January and July in each year, in the city of New York, until the maturity of said bonds and the principal thereof shall be paid; all of such bonds to be dated on the first day of January, A. D. 1857, and
245 to be on an equality, so far as regards security for the payment thereof by these presents, each of said bonds being authenticated by a certificate signed by said parties of the second part, and each containing a clause permitting the holder thereof to exchange the same at par for ten shares of stock in said railroad company at par, convertible at any time within five years from the date thereof:

Now, therefore, this indenture witnesseth, that the said parties of the first part, in order to secure the payment of said bonds and interest, and in consideration of one dollar to them in hand paid by the said parties of the second part at the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, transferred, and conveyed, and by these presents do grant, bargain, sell, transfer, and convey, to the said parties of the second part, their successor or successors in the trust hereby created, and assigns, all the following real and personal property and estate of the parties of the first part; that is to say, all of the first division of their said railroad from the said city of Milwaukee to the said city of Green Bay, both in the State of Wisconsin aforesaid, a distance of one hundred and twenty miles, including the right of way and land occupied by said first division of said road, together with the superstructure and tracks

thereon, and all rails and other materials used thereon, bridges, viaducts,
246 culverts, fences, equipments, necessary depot grounds, and buildings thereon, belonging to the parties of the first part, and all rolling stock, engines, tenders, cars, tools, materials, machinery, fixtures, and all other personal property appertaining to said first division of said road, and now belonging to the parties of the first part, or hereafter to be acquired by them, and all rights thereto, and enterests therein, and also all future rights thereto and interests therein to be acquired by the parties of the first part, together with the name and functions appertaining to the said first division of said road, all tolls, rents, and income to be had or levied therefrom, and all corporate and other franchises, rights, and privileges of the said parties of the first part in and to or concerning the same. But nothing herein shall be so construed as to prevent the parties of the first part from selling by hypothecating or otherwise disposing of any city, town, village, or county bonds, or farm mortgages, or other securities, received in payment of stock, or otherwise, or of any bonds or other property of the parties of the first part, not necessary to be retained fur the roadway, depot grounds and stations, nor required for the construction or convenient use of said first division of said road, or any wood lots, nor from collecting monies due the said company on stock subscriptions, or otherwise. Nor shall anything herein contained be so construed as to prevent the said parties of the first part from collecting and appropriating toward the construction, use, and repairs of the said road, or of
247 any part thereof, all stock subscriptions, donations, or loans of money, lands or other property which may have been or may hereafter be made for that purpose; but the said parties of the first part shall have full right and power so to proceed without let or hindrance from the said parties of the second part, their successor or successors in the trust hereby created, or assigns. And the said parties of the first part hereby further covenant and agree to and with the said parties of the second part, their successor or successors in the trust hereby created, or assigns, that for the further security and ultimate redemption of the said mortgage bonds to be issued by virtue of this mortgage, or such number thereof as may have been issued and not converted into the capital stock of said railroad company within five years from the date hereof, they will cause to be paid to the said parties of the second part, their successor or successors in the trust hereby created, and assigns, semi-annually, on the first day of January and first day of July in each year, commencing on the first day of January, A. D. 1861, towards a sinking fund for the redemption of said bonds then outstanding, such sums as, with interest accruing thereon, shall be sufficient to pay, on the maturity thereof, the whole amount of said bonds so issued and not converted into capital stock as hereinbefore provided, which amount shall be by the said parties of the second part, their successor or successors in the trust hereby created, and assigns, from time to time invested in the purchase of the bonds of this issue so long as they can be obtained at a price not exceeding their par value, and when said bonds cannot be
248 obtained at a price within said limit, then said sinking fund shall be invested in such other securities as shall be directed by the board of directors of the parties of the first part. Provided, however, that the obligation of the parties of the first part to make such semi-annual payments to the said sinking fund as aforesaid shall cease and determine as soon as the funds and securities placed in the hands of the said parties of the second part, their successor or successors in the trust hereby created, and assigns, shall, with the accumulations of interest thereon, form a capital sufficient to pay and discharge at the maturity thereof all the outstanding unconverted bonds of this issue. The said parties of the second part or their successors shall at all times keep a proper and correct registry and

account of the said several securities and funds to be held by them as aforesaid, and belonging to said sinking fund, for the inspection of and examination of the parties of the first part, and of any of the stockholders or bondholders of the road, and shall annually after the commencement and during the continuance of the said trust render to the parties of the first part a written statement showing the true state and condition of the said sinking fund, and when any of the aforesaid securities of the parties of the first part shall have been purchased for the use of the sinking fund, the same shall, as soon as purchased, be cut, cancelled, and retired by the said parties of the second part, or their successors, and held and returned by
249 them at the expiration of their trust. The interest coupons on such purchased bonds are, however, to be regularly paid to the said parties of the second part, or their successors, by the parties of the first part in the same manner as if held and owned by a third party for value. And in case of the resignation of the said parties of the second part as trustees under this mortgage, or as receiver of such sinking fund, or of any of the powers or duties devolving upon said parties of the second part under the provisions of this instrument, the parties of the first part hereby reserve the right to supersede and revoke the aforesaid appointment of the said parties of the second part, or their successor or successors under the trust hereby created, and assigns, and from time to time appoint and substitute as new trustees under this mortgage, or receiver of such sinking fund, any other incorporated institution located and doing business in the city of New York, fit and suitable for that purpose; and said new trustee or receiver, or the successors thereof, shall be vested with all the rights, estates, powers, and privileges hereby conveyed or vested in the said parties of the second part, their successor or successors in the trust hereby created, and assigns. But in case the said parties of the first part should neglect to appoint or substitute such new trustee or receiver for thirty days, the holders of a majority of the said outstanding bonds of this issue may apply to the supreme court of the State of Wisconsin to appoint a new trustee or re-
250 ceiver, being some incorporated institution located and doing business in the city of New York, and thereupon, and upon the acceptance of the trust such new trustee and receiver shall become vested, for the purposes aforesaid, with all the rights, estate, property, and interest hereby conveyed to or vested in the said parties of the second part, their successor or successors in the trust hereby created, and assigns, without any further assuming or conveying the same. But if the same shall be necessary, both or either of the parties hereto shall execute and deliver any other or further releases or conveyances for that purpose, to the end that the true intent, object, and meaning of this instrument may be fully and faithfully carried into effect. And the said parties of the second part or their successors shall, upon request, forthwith assign, transfer, and deliver to such substituted trustee or receiver all the funds, property, and securities belonging to the said sinking fund so deposited with and held by them as aforesaid. The said parties of the second part, their successor or successors in the trust hereby created, and assigns, shall apply the funds and available securities in their hands to the payment and redemption of the said mortgage bonds of this issue, at their maturity, rendering the overplus, if any, to the parties of the first part or their assigns.
251 To have and to hold the said premises, real and personal estate and property, and every part and parcel thereof, with the appurtenances, unto the said parties of the second part, their successor or successors in the trusts hereby created, and assigns, upon the following trusts; that is to say, that in case the said parties of the first part shall fail to pay the principal or any part thereof, or any of the interest, or any of the said mortgaged bonds of this issue, (whether the same belong to third parties

or to the sinking fund,) at any time when the same shall become due and payable according to the tenor thereof when demanded, or in case the parties of the first part shall fail, neglect, or refuse to set apart, appropriate, and deposit with the said parties of the second part, their successor or successors, the necessary sums of money, or any or either of them, for the purpose of a sinking fund, at the times and in the manner hereinbefore particularly set forth and provided, and on the dates herein specified, or within sixty days thereafter, then, and in such case, the whole amount of the principal of said bonds shall at once become due and payable, and the said parties of the second part, their successor or successors in the trusts hereby created, and assigns, shall proceed without delay to convert the securities held by them on account of said sinking fund into money, and apply
252 the same pro rata towards the payment of said bonds then outstanding and unconverted, and also that said parties of the second part, their successor or successors in the trust hereby created, and assigns, shall thereafter, upon the written request of five bona fide holders of said bonds, cause the said premises, real and personal estate, and property, rights, and franchises, or as much thereof as shall be necessary to pay and discharge the principal and interest of all such mortgage bonds of this issue as may be then unpaid and unconverted, and not purchased and deposited in the sinking fund, to be sold at public auction in the city of Milwaukee, and State of Wisconsin, or in the city of New York, giving at least ninety days' previous notice of the time, place, and terms of such sale, and of the real and personal property and estate, rights, and franchises to be sold by publishing the same in two newspapers of good circulation in each of the cities of Milwaukee and New York aforesaid, and wherever else required by law, and execute and deliver to the purchaser or purchasers thereof a good and sufficient deed of conveyance in fee simple for the same, which shall be a bar against the parties of the first part, their successors and assigns, and all parties claiming under them, of all right, interest, or claim of, in, or to said premises, real and personal estate, and property, rights, and franchises, or any part thereof. The amount of the bid or purchase-money on the said sale may be paid and satisfied in whole or in part by the outstanding mortgage bonds of this issue, and the same shall be taken
253 and received in whole or in part payment and satisfaction by the parties of the second part, their successor or successors in the trust hereby created, and assigned, according to their value, to be ascertained and determined by the net amount arising from said sale, together with the amount of unapplied cash effects belonging to the sinking fund as compared to the amount of outstanding unconverted, and unpurchased bonds of this issue, as aforesaid.

And the said parties of the second part shall, after deducting from the proceeds of said sale the costs and expenses thereof, apply so much of the proceeds as may be necessary to the payment of said principal and interest due and unpaid on the residue of the said outstanding mortgage bonds of this issue, and not converted or purchased for the sinking fund, nor used in payment of said bid as aforesaid, and shall pay over and restore the remainder of said proceeds, if any there be, to the parties of the first part, their successors or assigns. It being hereby expressly understood that in no case shall any claim or advantage be taken of any valuation, appraisement, or extension laws, by the said parties of the first part, nor any injunction or stay of proceedings, or any process be applied for or obtained by them to prevent such entry or sale as aforesaid.

And the said parties of the first part hereby covenant, for the consideration aforesaid, to execute and deliver any further reasonable and necessary conveyance or conveyances of the premises or any part thereof to
254 the said parties of the second part, their successor or successors in

the trust hereby created, or assigns, for more fully carrying into effect the objects hereof, particularly for the conveyance of any rights, interest, or property subsequent to the date hereof acquired by the said parties of the first part and comprehended or intended so to be in the description and terms of this instrument.

And the said parties of the first part hereby covenant as aforesaid that the money borrowed for the purpose aforesaid upon the security of the said mortgaged bonds of this issue shall be faithfully applied to the purchase and transportation of iron rails and machinery, and for the construction and extension of said road, and the expenses attending such loan and purchases; and the said rails and machinery so purchased shall be transported and used with due diligence in the construction, finishing, and furnishing said railroad. And it is mutually agreed, and these presents are upon this express condition, that on the payment of the principal and interest of said mortgage bonds of this issue or on conversion thereof into stock in manner aforesaid, the estate hereby granted to the parties of the second part, their successor or successors in the trust hereby created, or assigns, shall be void, and the rights to the premises and real and personal estate and property hereby conveyed shall revert to and revest in the said parties of the first
255 part without any acknowledgement of satisfaction, reconveyance, reentry, or other act; but when the principal and interest of all the mortgaged bonds of this issue shall be fully paid and the said bonds duly cancelled the said parties of the second part, their successor or successors in the trust hereby created, or assigns, shall, upon the request of the parties of the first part or their assigns, duly execute and acknowledge payment and satisfaction of this mortgage, and shall deliver up the same to the parties of the first part or their assigns, to the end that the same may be duly and properly satisfied, cancelled, and discharged of record.

And it is also further mutually agreed that the said parties of the second part, their successor or successors in the trust hereby created, or assigns, shall be accountable only for reasonable diligence in the management of the several trusts and matters herein and hereby committed to their care, control, and authority, and shall not be responsible for the act of any agent or attorney employed by them when such agent or attorney is selected with reasonable discretion.

And the said parties of the second part, their successor or successors in the trust hereby created, shall be entitled to receive proper compensation for any labor or service performed by them in the discharge of the trusts hereby conferred and assumed.

In witness whereof, the said the Milwaukee and Superior Railroad
256 Company, the parties hereto of the first part, have caused their corporate seal to be hereunto affixed, and the name of the president to be signed to these presents, and the said the Farmers' Loan and Trust Company have also caused their corporate seal to be hereunto affixed and the name of their president to be signed to these presents, the day and year first above written.

The Milwaukee and Superior Railroad Company by—

[SEAL.] C. R. ALTON, *President.*

[SEAL.] D. D. WILLIAMSON,
Pres't. Farmers' Loan, Trust Co.

Countersigned.

H. K. WHITE, *Secretary.*

Sealed, signed, and delivered in presence of—

WINFIELD SMITH.

JONATHAN LAY.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Be it remembered, that on the second day of January, A. D. 1857, personally came before me C. R. Alton, to me known to be president, and H. K. White, secretary of the Milwaukee and Superior Railroad Company, and acknowledged the execution of the foregoing instrument as president and secretary as aforesaid on the part of said company for the uses and purposes therein set forth.

[SEAL.] G. VON DEUTSCH,
Notary Public, Milw. County, Wisconsin.

257 STATE OF NEW YORK,
New York City and County, ss:

Be it remembered, that on the sixth day of January, A. D. one thousand eight hundred and fifty-seven, before me, Joseph C. Lawrence, commissioner in and for the State of New York, duly appointed and commissioned by the governor of the State of Wisconsin to take the acknowledgments and proof of deeds and other instruments of writing under seal to be used or recorded in said State of Wisconsin, personally came D. D. Williamson, to me personally known to be the president of the Farmers' Loan and Trust Company, who, being by me duly sworn, did depose and say that he is the president of the said Farmers' Loan and Trust Company; that he knows the corporate seal of said company; that the seal hereunto affixed is such corporate seal, and was duly affixed by the order of the board of trustees; and that he signed his name thereto by the like order as president of said company, and acknowledged that he had executed the same as the act and deed of the said Farmers' Loan and Trust Company, for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year above written.

[SEAL.] JOSEPH C. LAWRENCE,
Commissioner for the State of Wisconsin, in and for the State of New York, 67 Wall street, N. Y.

Endorsed: State of Wisconsin, Secretary's office, ss: Recorded in Book of Railroad Mortgages, at 10 o'clock a. m., Jan'y 13, 1857, on pages 109, 110, 111, 112, 113, 114, 115.

JOHN W. HUNT, *Asst. Sec'y.*

STATE OF WISCONSIN, *Secretary's office, ss:*

258 The secretary of state of the State of Wisconsin hereby certifies that the foregoing mortgage was recorded on pages 109, 110, 111, 112, 113, 114, and 115 of Railroad Mortgages in his office, at ten o'clock a. m., January 13, 1857, and that the same is the first and only mortgage given by the Milwaukee and Superior Railroad Company recorded in his office.

Witness the great seal of the State of Wisconsin, at the Capitol,
[SEAL.] in Madison, this 13th day of January, A. D. 1857.

JOHN W. HUNT,
Asst. Secretary of State.

A copy of the original in the possession of the Farmers' Loan and Trust Company.

D. D. WILLIAMSON.

B, Wm. Emerson, commissioner.

This memorandum of an agreement, made this fourth day of Dec., A. D. 1856, by and between Bailey Brothers & Co., of Liverpool, G. B., by their

agents, C. B. Raymond & Co., of the city of New York, of the first part, and the Milwaukee and Superior Railroad Company, (a corporation duly established by a law of the State of Wisconsin,) by their president, C. R. Alton, of the second part, witnesseth, that said Bailey Brothers & Company, by said C. B. Raymond & Co., ag'ts as aforesaid, have this day sold and agreed to deliver to said Milwaukee and Superior Railroad Company four thousand tons of iron rails of a T pattern, so called, to
259 weigh about fifty-six pounds per linear yard, pattern same as that furnished by said Bailey Brothers & Company to the Racine and Mississippi Railroad Co., ninety per cent. of entire quantity to be eighteen feet long, and remaining ten per cent. in lengths not less than twelve and one half feet long, to be sound bars, cut square at both ends, of good merchantable quality in material and workmanship. Said Bailey Brothers & Company agree to ship said four thousand tons of iron rails on board vessels in Great Britain, bound to said for the port of New York, said shipments to be made in the months of March, April, and May next. In consideration of which aforesaid undertaking by said Bailey Brothers & Company, said Milwaukee and Superior Railroad Company agree to receive said iron rails on arrival at said port of New York, and then and there to pay to said C. B. Raymond & Company, for each and every ton of rails so received, fifty dollars per ton at most; that is to say, for the rails free on board ships at port of shipment, insurance and freight to said port of New York included, said railroad company agree to enter said rails at custom-house and account for the duties thereon in addition to said price of fifty dollars per ton at most. Said fifty dollars per ton at most shall be paid to said C. B. Raymond & Co. in manner following: in cash for amount of freight on each parcel or cargo, balance in notes of said railroad company, made payable in the city of New York to the order of their treasurer, and by him endorsed at six,
260 nine, and twelve months, equal amounts, with interest at rate of seven per cent. added; said notes to be endorsed by C. R. Alton, H. Haertel, Edw'd Button, and D. P. Hull, or others in responsibility satisfactory to said C. B. Raymond & Co. With said notes so endorsed shall be lodged the first mortgage eight per cent. bonds of said railroad company at fifty per cent., that is, for every dollar in notes two dollars in bonds; it being expressly agreed that in case of default in payment of any of said notes said C. B. Raymond & Company have the right and are hereby authorized to sell said bonds at auction or otherwise, without notice to said railroad company, and apply the proceeds to said default, said payments in cash and notes and said deposit of bonds to be made for each parcel or cargo on arrival at said port of New York; the notes to date from said arrival and all settlements or payments to be made in the city of New York.

It is mutually agreed that notwithstanding said railroad company pay freight and provide for duties on said iron rails, and have nominal possession for custom-house purposes, the actual possession remains with said C. B. Raymond & Co. through their trustee, Morris K. Jesup, until said rails are laid down on the road of said railroad company. This provision is made to retain the iron as security to said C. B. Raymond & Co. until it is actually laid down on the road of said company.

It is further mutually agreed that said Bailey Brothers & Company shall not be held responsible for any delays which may arise from loss,
261 capture, or casualty at sea, to any parcel or cargo of said rails, or in consequence of any war that may exist, or prospect of war at times of shipment, or in consequence of strikes of workmen, and they shall not be bound to replace any cargo lost or missing at sea unless notified in writing by said railroad company, said notice to be given immediately after such loss is ascertained; and upon receipt of said notice said Bailey Brothers

& Company shall proceed to reship as soon as practicable for them to do so.

In witness whereof, the parties hereunto have interchangeably set their hands this fourth day of December, A. D. 1856.

Milwaukee and Superior RR. Co. by—

(S'd) C. R. ALTON, *Pres't.*

A copy of the paper referred to in my deposition.

ISAAC H. KNOX.

C, Wm. Emerson, com'r.

C. B. Raymond & Co., agents for Milwaukee and Superior RR. Co.:

4,000 tons of iron rails, T pattern, w't 56 pounds, pattern same as R. and Miss. RR. Co., 90 per cent. of entire quantity to be eighteen feet long; 10 per cent. of entire quantity to be not less than 12½ f't long. Shipments of same so be made from Great Britain during months of March, April, and May next. Price, $50 p'r ton at most, insurance and freight included;
262 payment to be made for freight in cash; balance notes of comp'y at 6, 9, 12 m's; int. 7 per cent p'r an. Notes to be endorsed by C. R. Alton, H. Haertel, Ed. Button, D. P. Hull, or others in responsibility and satisfactory to C. B. R. & Co. Notes secured by 1st mortgage bonds of comp'y at 50 per cent. Iron to remain in possession of M. K. Jesup, trustee for C. B. R. & Co., until the same is laid down on line of road.

No responsibility for delays, loss, &c.

	T.	C.	Q.	lb.
July, 1857. Total quantity	4,000	0	0	0
Delivered to this date	1,362	0	0	14
Balance	2,637	19	3	14

Delivery of which is postponed until next year by mutual agreement.

263 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to Robert D. Smith, esq., Boston, Mass., greeting:

Know ye that, in confidence of your prudence and fidelity, you have been appointed, and by these presents you, or any one or more of you, are invested with full power and authority to examine Holmes Hinckley, on his corporal oath, as witness in a cause depending in the district court of the United States for the district of Wisconsin, wherein G. P. Drury and William Page, assignees of the Boston Locomotive Works, are complainants, and the Milwaukee and Superior Railroad Company and others are defendants, on the part of the complainants, upon the interrogatories annexed to this commission, and therefore you are hereby commanded that you, or any one or more of you, at certain days and places to be appointed by you for that purpose, do cause the said Holmes Hinckley to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination and reduce the same into writing, and return the same annexed to this writ, closed up under your seal, or the seals of any one or more of you, into the said district court of the United States, before the judge thereof, with all convenient speed.

Witness the Honorable Andrew G. Miller, judge of the district court of the United States of America for the district of Wisconsin aforesaid, at the city of Milwaukee, in said district, this twentieth day of May, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

J. M. MILLER, *Clerk.*

264 *Rules.*

On the receipt of the commission made out as aforesaid, by any one of the commissioners named, he shall give notice to the other commissioners named therein, of the time and place of taking the depositions, if possible, and if any of the commissioners are absent at the execution of said commission, any one or more present may proceed to execute the same, (unless otherwise expressly directed therein,) as if all were present; but they must certify that those absent have been duly served with notice of the time and place of executing said commission, or the reasons for their not being so notified.

The persons to whom such commission shall be directed, or any one or more of them, unless otherwise expressly directed therein, shall execute the same, as follows:

First. They or any of them shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses, to the interrogatories proposed to them, shall be the truth, the whole truth, and nothing but the truth.

Second. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him, and certified by such of the commissioners as are present at the taking of the same.

Third. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall, in like manner, be subscribed by the witness proving the same. (This section must be understood to refer to such papers as can be produced upon the examination.) If the paper referred to be a record not subject to the control of the party or the commissioners, it will be sufficient to annex a copy, and the original may be produced on the trial, separate from the commission.

Fourth. The commissioner or commissioners shall subscribe each sheet of the depositions, and annex all the depositions and exhibits to the commissions, upon which the return shall be endorsed, and shall close them up under their or his seals, and shall address the same, when so closed, to the clerk of the court from which the commission issued, at his place of residence, with the style of the suit.

Fifth. If there is or is not a direction on the commission to return the same by mail, they or he shall immediately deposit the packet, so directed, in the nearest post office.

Sixth. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet, so directed, shall be delivered to said agent.

265 U. S. district court, district of Wisconsin.

G. P. Drury and William Page, assignees of the Boston Locomotive Works,
vs.
The Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

Interrogatories to be propounded to Holmes Hinckley, a witness to be produced, sworn, and examined on the part and behalf of G. P. Drury and William Page, assignees of the Boston Locomotive Works, complainants in an action now pending against the Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, defendants, in the district court of the United States for the district of Wisconsin, in equity, before Robert D. Smith, esq., of Boston, Mass., under and by virtue of a commission, hereto annexed.

First interrogatory. What is your age? Where did you reside during the years 1856, 1857, and 1858, and where do you now reside?

Second interrogatory. Do you know the parties, complainants and defendants, in the title to these interrogatories named, or either, and which, of them and how long have you known them, or either and which of them?

Third interrogatory. Did you know in the years 1856, 1857, and 1858, and do you now know a corporation or company called and known as the
266 Boston Locomotive Works? If yea, where was its place of business, and who were its officers during said years? What was the business of said corporation or company, and who was the business agent or officer of said compauy or corporation? If you know, state fully.

Fourth interrogatory. Do you know C. R. Alton? If yea, when did you first become acquainted with him, and what was his business at that time?

Fifth interrogatory. If you answer to the third direct interrogatory that you was president of the Boston Locomotive Works, and that the business of said corporation or company was manufacturing locomotive engines, state, if you know, whether such company or corporation ever made or entered into any contract or agreement with the defendant, the Milwaukee and Superior Railroad Company, for manufacturing or delivering to said railroad company any locomotive engines? If yea, was such contract or agreement in writing? If in writing, attach the same to your deposition, if you have it. If not in writing, state the same fully.

Sixth interrogatory. If you answer to the fifth direct interrogatory that a contract was made between the Boston Locomotive Works and the Milwaukee and Superior Railroad Company, for the construction and delivery of locomotive engines to said railroad company, state whether all of
267 said locomotives contracted for, or how many, if any, were delivered to said railroad company, in pursuance of such agreement. If all were not delivered, state why they were not all delivered.

Seventh interrogatory. What, if anything, was received by said Boston Locomotive Works from said railroad company, for or to secure the payment of the purchase price of said engines so delivered? State fully.

Eighth interrogatory. If you answer to the seventh interrogatory that the Boston Locomotive Works received the notes of the said railroad company to secure the payment of the purchase price of said engines, have any or either, and which, of them been paid?

Ninth interrogatory. Do you know anything and what about the foreclosure or sale, pursuant to a notice, printed in any and what newspaper, of a mortgage given by the said railroad company to the Farmers' Loan and Trust Company, on a portion of their road and personal property, or the sale under the decree in said foreclosure suit? When was the first time you became possessed of any information in relation thereto? Did the Boston Locomotive Works receive any, and what notice of said foreclosure suit, or of said sale or any of the proceedings in relation thereto? State fully.

Tenth interrogatory. Upon receiving such notice, if any was received, what, if anything, was done by said company to secure the amount
268 due them on their said notes, and when was the same done?

Eleventh interrogatory. If you answer to the tenth interrogatory that the Boston Locomotive Works commenced proceedings and recovered a judgment against said railroad company, state whether that judgment has ever been paid or satisfied. If not, who is now the owner or owners thereof, and whether said judgment is the same one mentioned in the complainants' bill of complaint?

Twelfth interrogatory. Do you know of any sale at public auction in the city of Milwaukee or elsewhere, and where, of any and what bonds of said railroad company? When did you first receive notice, if any, of said sale, if any? Did the Boston Locomotive Works receive at any time, any notice, and what, of such sale, if any, and at what time?

Last interrogatory. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

PRICHARD & JACKSON,
Sol'r for Compl'ts.

J. H. KNOWLTON,
MAT. H. CARPENTER, *of Counsel.*

269 UNITED STATES OF AMERICA,
District of Wisconsin:

I, John M. Miller, clerk of the district court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of [SEAL.] Wisconsin, this twentieth day of May, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the said United States the eighty-sixth.

J. M. MILLER, *Clerk.*

Endorsed: U. S. district court, Wisconsin. G. P. Drury and William Page, assignees, &c., *vs.* the Milwaukee and Superior Railroad Company *et al.* Commission opened as per stipulation filed September 30, 1862.

J. M. MILLER, *Clerk.*

The deposition of Holmes Hinckley, a witness produced, sworn, and examined before me, Robert D. Smith, on the thirtieth day of June, A. D. 1862, and the first day of July, A. D. 1862, at Boston, in the county
270 of Suffolk, and commonwealth of Massachusetts, by virtue of a commission issued out of and under the seal of the district court of the United States of America for the district of Wisconsin, in a cause now depending in said court between G. P. Drury and William Page, assignees of the Boston Locomotive Works, complainants, and the Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, are defendants.

1. To the first interrogatory Holmes Hinckley saith: My age is sixty-eight years; I resided in Boston in the years 1856, 1857, and 1858, and I still reside in said Boston.

2. To the second interrogatory he saith: I know G. P. Drury and William Page. I have known G. P. Drury for the last thirty years. I have known William Page for about four years. The parties defendants, in the title to these interrogatories named, I do not know. Before me.

ROBERT D. SMITH, *Commissioner.*

3. To the third interrogatory he saith: I did know a corporation called the Boston Locomotive Works in the years 1856, 1857, and 1858. In 1859 said corporation went into insolvency, and there is now no such corporation. The place of business of said corporation was upon Hamson avenue, in said Boston. I, Holmes Hinckley, was president; Daniel F. Child, of Boston, was treasurer, and Joseph F. Morton was the chief clerk during the years mentioned and during the existence of the corporation. In 1856 the said
271 Hinckley, Childs, and Morton, Jonathan Ellis, of Boston, and Edward

F. Troffiter, also of Boston aforesaid, were the directors. In the years 1858 and 1859 Joel Nourse, of said Boston, was a director in place of said Troffiter; at what time this substitution was made I am unable to say. The business of said corporation was the building of locomotive engines, and other machinery. I was myself, generally, the business agent or officer of such corporation; sometimes said Morton acted as agent. Before me.

R. D. SMITH, *Commissioner.*

4. To the fourth interrogatory he saith: I became acquainted with C. R. Alton in the fall of 1856. I knew him from that time till 1858. When I first became acquainted with him he was the president of the Milwaukee and Superior Railroad Company. He and Mr. Lovell, the engineer of the said railroad, were engaged in the purchase of locomotives.

5. To the fifth interrogatory he saith: I do know that said Boston Locomotive works entered into a contract with said Milwaukee and Superior Railroad Company for manufacturing and delivering to said railroad company locomotive engines. The contract was by correspondence. I wrote a letter, bearing date December 12th, 1856, to said Alton, in New York, making him a proposition. To this letter Mr. Alton replied by a letter bearing date December 16, 1856. A copy of said letter to Mr. Alton, and a copy
272 of Mr. Alton's reply thereto, both sworn to by said Holmes Hinckley, and marked, respectively, "A" and "B," with the initials of the commissioner, R. D. S., are hereto annexed. Before me.

ROBERT D. SMITH, *Commissioner.*

6. To the sixth interrogatory he saith: All said locomotive engines were not delivered in pursuance of such agreement. There were two locomotives delivered, one in July and one in September, 1857. The reason why all were not delivered was this: a letter was received by said corporation from Mr. Alton informing us not to deliver more than two of said locomotives. A copy of said letter, sworn to by said Holmes Hinckley and marked "C," with the initials of the commissioner, is hereto annexed.

7. To the seventh interrogatory he saith: The Boston Locomotive Works received the said Milwaukee and Superior Railroad Company's notes on nine and twelve months. Said notes were for the price of a locomotive and tender, and were given upon its delivery and had interest added at seven per cent. The said corporation received, as collateral security, with said notes securities called "farm mortgages," on the line of the road, with the bonds attached as stipulated in my letter, above mentioned, bearing date December 12, 1856. Before me.

ROBERT D. SMITH, *Commissioner.*

273 8. To the eighth interrogatory he saith: None of said notes were paid or have been paid.

9. To the ninth interrogatory he saith: I know nothing about the foreclosure and sale, pursuant to a notice printed in any newspaper, of a mortgage given by said railroad company to the Farmers' Loan and Trust Company on a portion of their road and personal property, or the sale under the decree in said foreclosure suit, except that I have heard from the attorneys of the Boston Locomotive Works in Wisconsin that such sale was made. I think I first received information of these proceedings in 1858. I have no knowledge that the Boston Locomotive Works received any other notice than this above mentioned of said foreclosure suit, sale, or of any proceedings in relation thereto, but there might have been other notice received. Before me.

ROBERT D. SMITH, *Commissioner.*

10. To the tenth interrogatory he saith: Upon the receipt of the farm mortgages we had their titles and value examined by our attorneys at Janesville, and upon being informed that the titles were defective and the farms of much less value than represented by Mr. Alton previous to our first letter, we put the whole matter into the hands of Messrs. Knowlton, Prichard & Jackson, with instructions to them to protect our interests. We had the titles to the farm mortgages examined in the fall of 1857.

274 11. To the eleventh interrogatory he saith: Said Boston Locomotive Works did commence proceedings, and recovered a judgment against said railroad company, which to my knowledge has never been paid or satisfied; that now the assignees of the Boston Locomotive Works, G. P. Drury and William Page, are the owners thereof, and I believe said judgment to be the one mentioned in the complainants' bill of complaint. Before me.

ROBERT D. SMITH, *Commissioner.*

12. To the twelfth interrogatory he saith: I do not know of any sale, as set forth in said interrogatory, and I do not know that I or the Boston Locomotive Works at any time received any notice of any such sale as that mentioned in said interrogatory, but there might have been such sale and notice.

13. To the last interrogatory he saith: Our company, the Boston Locomotive Works, were induced to enter into this contract or arrangement with the Milwaukee and Superior Railroad Company by the favorable representations made to us by Mr. Alton and Mr. Lovell, the engineer, previously to our propositions of December 12, 1856, and in particular by the security they proposed to give us, being upon farms represented to be upon the line of the road, free from incumbrances, and of value fully equal to the amount secured upon each farm. Upon investigation we found ourselves to be very much deceived and disappointed in the value of these securities. Said farms were, most of them, of much less value than that represented to us;

275 many of them were encumbered, and the titles of many of them were defective. During the years 1858 and 1859 I was much occupied with other business of said Boston Locomotive Works. The correspondence in connection with the contract and matters spoken of in this deposition was carried on chiefly by Mr. Morton and by Mr. Childs, our treasurer during those years. As the representations were made to me, personally, by Mr. Alton, and as I concluded the contract with him, my recollection of those matters is distinct. Mr. Alton represented the farm mortgages proposed as collaterals to be the best security in Wisconsin.

HOLMES HINCKLEY.

Before me.

ROBERT D. SMITH, *Commissioner.*

"A" R. D. S.

BOSTON, *Dec.* 12, 1856.

C. R. Alton, esq., pres't Milwaukee and Superior RR. Co., at Lafarge Hotel, New York:

DEAR SIR: We would hereby propose to build for the Milwaukee and Superior RR. Co. five locomotive engines, of the same capacity and description of those recently built by us for the Chicago, St. Paul, and Fond du Lac RR. Co., general dimensions as follows, viz: Cylinder, 15 in.; cal. 24-in. stroke; driving-wheels 5 feet dia.; boiler, to contain 140 flues, 11 ft., 2 in.; 8-wheel tender, with tank of 1,800 gallons capacity, and all fixtures to make

276 the engines and tenders complete, all warranted to be made of good stock and built in a thorough and workmanlike manner; to be deliv-

ered at Buffalo, N. Y., one the first of July, one the first of August, one the first of September, one the first of October, one the first of November, and one the first of December, 1857; payment to be made in the railroad co.'s notes on nine and twelve months, dated at the time of the delivery of the machines in Buffalo, with interest added at the rate of seven per cent. per annum; the price of each engine, with its tender, to be nine thousand dollars. As collateral for the payment of the notes the railroad company to place in our hands farm mortgages, taken on the line of the Milwaukee and Superior RR., with ten years 8 per cent. bonds of said railroad to attached; the bonds to be taken at seventy-five per cent., we having the right to dispose of the said collateral if the notes should not be paid at maturity.

Yours truly,

HOLMES HINCKLEY.
HOLMES HINCKLEY.

ROBERT D. SMITH, *Commissioner.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

JULY 1, 1862.

Then personally appeared the said Holmes Hinckley and made oath that the above copy, by him subscribed, upon his knowledge and belief is a true copy, and that the original is not in his possession or accessible to him.

Before me.

277 R. D. SMITH, *Commissioner.*

B, R. D. S.

NEW YORK, *Dec'r* 16, 1856.

Holmes Hinckley, esq., pres't Boston Locomotive Works:

DEAR SIR: We accept the proposition made in your letter of 12th Dec'r, to furnish our Milwaukee and Superior Railroad Co. five engines on the terms and conditions therein contained. I will endeavor to be in Boston in two or three days, but cannot state definitely the day; will you have the contracts drawn in duplicate, and hand them to Mr. Lovell, who can send or bring them to me, if circumstances should prevent my visiting Boston. You will advise me of receipt of this. Address as before, at Lafarge Hotel.

Very truly your ob't serv't.

C. R. ALTON, *Pres't Mil. and Superior RR.*
HOLMES HINCKLEY.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

BOSTON, *July 1st*, 1862.

Then personally appeared the said Holmes Hinckley, and made oath that the above copy by him subscribed upon his knowledge and belief, is a true copy, and that the original is not in his possession. Before me.

ROBERT D. SMITH, *Commissioner.*

C, R. D. S.

NEW YORK, *Sept.* 12, 1857.

Holmes Hinckley, esq.:

278 DEAR SIR: I am compelled to go west on Monday, and wish you to send the notes to me at Milwaukee to be signed, and I will return them to you with the proper am't of farm mortgages at once. Please deduct in making the statement of cost proportion of freight properly payable by you on the Meguon, which, I suppose, will be from $175 to $200 How shall we do about that item on Ozaukee? Do not furnish another engine for us yet.

The times are so severe that I do not think we shall need or can use more than two this fall. It had better be in your shop than elsewhere. Will come to Boston on my return in about two weeks.

Your ob't serv't,

C. R. ALTON, *Pres't Mil. and Sup. RR.*
HOLMES HINCKLEY.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

BOSTON, *July 1st*, 1862.

Then personally appeared the said Holmes Hinckley, and made oath that the above copy by him subscribed, is a true copy, upon his knowledge and belief, and that the original is not in his possession. Before me.

R. D. SMITH, *Commissioner.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

BOSTON, *July 1st, A. D.* 1862.

This is to certify that I, Robert D. Smith, the commissioner named in the annexed commission, summoned the within-named Holmes Hinckley,
279 upon the thirtieth day of June, and examined him, having first administered to him an oath that the answers given by him to the interrogatories proposed to him should be the truth, the whole truth, and nothing but the truth. That said examination was continued, and finished upon the first day of July, A. D. 1862. That I myself reduced such answers as he made to writing; and that he subscribed his name to the same. That he examined and subscribed the copies of letters annexed to this deposition, marked A, R. D. S., B, R. D. S., C, R. D. S., respectively, and made oath before me that such copies were, upon his knowledge and belief, true copies, and that the originals were not in his possession.

In testimony whereof, I, Robert D. Smith, have hereunto set my hand and seal this first day of July, A. D. 1862. Fees of witness $2 00. Fees of commissioner $20 00.

ROBERT D. SMITH. [SEAL.]

And the hearing being concluded, the court took time to consider. And afterwards, to wit:

280 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the sixth day) of July, A. D. 1863.

Present: The Honorable Andrew G. Miller, district judge, presiding.

On the twenty-sixth day of the said term, to wit, on the nineteenth day of September, A. D. 1863, the following proceedings were had, to wit:

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES OF THE BONTON LOCOMOTIVE WORKS,
vs.
MILWAUKEE AND SUPERIOR RAILROAD COMPANY, THE CITY OF MILWAUKEE, JAMES B. CROSS, JAMES LUDINGTON, AND SAMUEL B. SCOTT. } In equity

This day came the parties, by their counsel, and on consideration of the pleadings and proofs, and of the arguments of counsel, it is ordered, adjudged,

and decreed by the court that the complainants are equitably entitled to recover of the Milwaukee and Superior Railroad Company, twenty-six thousand one hundred and forty-five dollars and eighteen cents, the amount of
281 the debt, interest, and costs of the judgment set forth in their bill, and that the said complainants do have and recover of the said Milwaukee and Superior Railroad Company the said sum of twenty-six thousand one hundred and forty-five dollars and eighteen cents, together with their costs of this proceeding against said company to be taxed.

And it is further ordered, adjudged, and decreed by the court that the complainants' bill of complaint be, and hereby is, dismissed as to the several defendants, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott, and that these several defendants do recover of the complainants their costs to be taxed.

A. G. MILLER.

Endorsed: G. P. Drury and William Page, assignees of the Boston Locomotive Works, *vs.* Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

Decree signed, recorded, and enrolled, Sept. 19th, 1863.

J. M. MILLER, *Clerk.*

And afterwards, to wit, on the twenty-seventh day of the said term, to wit, on the twenty-first day of September, A. D. 1863, came the complainants, by their counsel, and prayed an appeal to the Supreme Court of the United
282 States. Whereupon it is ordered by the court that said appeal be, and hereby is, allowed upon said complainants giving bond, with sureties to be approved by the court, in the penalty of two hundred and fifty dollars, for the costs of said appeal.

And afterwards, to wit, on the fifth day of October, 1863, came the complainants, and filed their bond, in the sum of two hundred and fifty dollars, conditioned for the payment of the costs of this appeal, approved by the district judge as follows, to wit:

283 Circuit court of the United States for the district of Wisconsin.

G. P. DRURY AND WILLIAM PAGE, ASSIGNEES OF THE BOSTON LOCOMOTIVE WORKS, complainants,
ag'st
THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, JAMES B. CROSS, James Ludington, and Samuel B. Scott, defendants.
} In equity.

Know all men by these presents that A. A. Jackson, as principal for the above-named complainants, G. P. Drury and William Page, assignees of the Boston Locomotive Works, and Josiah A. Noonan, of the city of Milwaukee, Wisconsin, as surety are held and firmly bound unto the above-named defendants, James B. Cross, James Ludington, and Samuel B. Scott, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said defendants, James B. Cross, James Ludington, and Samuel B. Scott, their heirs, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves and
283½ each of us, our and each of our heirs, executors, and administrators, jointly and severally, and firmly by these presents. Sealed with our seals, and dated this 5th day of October, A. D. 1863.

Whereas the above-named G. P. Drury, and William Page, assignees of the Boston Locomotive Works, have prosecuted an appeal to the Supreme Court of the United States, to correct and reverse the final decree rendered in the above-entitled action, on the 21st day of September, A. D. 1863, by the circuit court of the United States, for the district of Wisconsin:

Now, therefore, the condition of this obligation is such that if the above-named G. P. Drury and William Page, assignees of the Boston Locomotive Works, shall prosecute their said appeal to effect, and answer all such costs as may be decreed or adjudged to the said respondents on said appeal upon the affirmance of said decree by the Supreme Court of the United States, then the obligation shall be void; otherwise, the same shall remain in full force and effect.

A. A. JACKSON. [SEAL.]
J. A. NOONAN. [SEAL.]

Sealed and delivered in presence of—
M. H. CARPENTER.

[In. rev. stamp 25 cts.]

DISTRICT OF WISCONSIN, *ss:*

Josiah A. Noonan, of said district, being duly sworn, says that he
284 is a resident and free-born of the city of Milwaukee, in said district, and is worth the sum of five hundred dollars over and above all his debts and liabilities, in property not by law exempt from execution.

J. A. NOONAN.

Sworn and subscribed to before me this 5th day of October, A. D. 1863.
A. A. JACKSON,
U. S. court comm'r for district of Wisconsin.

October 5th 1863, approved by—
A. G. MILLER, *District Judge.*

[In. rev. stamp 5 cts.]

285 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals now on file and remaining of record in my office, and being a full and complete exemplification of the record and proceedings in the case of G. P. Drury and William Page, assignees of the Boston Locomotive Works, *versus* Milwaukee and Superior Railroad Company, the city of Milwaukee, James B. Cross, James Ludington, and Samuel B. Scott.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this seventh day of December, in the year of our Lord one
[SEAL.] thousand eight hundred and sixty-three, and of the independence of the said United States the eighty-eighth.

A. SCOTT SLOAN, *Clerk.*

Filed April 18, 1864.

SUPREME COURT OF THE UNITED STATES.

NO. 2 DEC. TERM, 1868.

G. P. DRURY AND WILLIAM PAGE,

APPELLANTS,

vs.

THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, JAMES B. CROSS, and others.

ABSTRACT OF PLEADINGS AND PROCESS, AND BRIEF FOR APPELLANTS.

A. A. JACKSON,

MATT. H. CARPENTER,

Of Counsel.

J. H. Yewdale, Law Printer, East Water, cor. Huron, Milwaukee.

SUPREME COURT OF THE UNITED STATES.

NO. 2 DEC. TERM, 1868.

G. P. DRURY AND WILLIAM PAGE, Assignees, &c., Appellants.

vs.

THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, JAMES B. CROSS, and others,

This is an appeal from a decree of the Circuit Court of the United States, for the District of Wisconsin, in equity, dismissing the creditors bill of complaint.

We subjoin an abstract of the allegations of the bill, together with the testimony under each point.

I.

Bill filed Jan'y 14, 1861, and states that the Boston Locomotive Works, recovered judgment on law side of said Circuit Court, on the 2d day of October, 1860,

Damages, - - - - -	$21,634.45
Costs, - - - - -	21.12

II.

TESTIMONY.

THE AMENDED RECORD CONTAINS THE COPY OF THE JUDGMENT RECORD, EXECUTION, RETURN, &C.

Deposition of Holmes Hinckley.

Answer to eleventh interogatory: "Said Boston Locomotive Works did commence proceeding and recover judgment against said Railroad Company, which to my knowledge has never been paid or satisfied, and that now the assignees of the Boston Locomotive Works, G P. Drury and William Page, are the owners thereof, and I believe said judgment to be the one mentioned in the complainant's bill of complaint. R. p 113.

The judgment was assigned to complainants before exhibiting this bill.

III.

States the incorporation of the Mil. & Superior R. R. Co., March 4, 1856.

TESTIMONY.

Chapter 79 of the Private and Local Laws of 1856, page 126.

IV.

That the company, about January 1, 1857, executed its mortgage and bonds to the amount of $550,000, on the first section of its road.

TESTIMONY.

Records of U. S District Court in case of Farmers Loan and Trust Co. vs. Milwaukee & Superior Railroad Company. Amended Record.

Deposition of Joshua Stark: "The first mortgage bonds were issued about the 1st of January, 1857. The amount of the entire issue then contemplated was $550,000." R. p. 70

Deposition of Herman Haertel: "My impression is that the number of bonds issued under the first mortgage on the first division of the road was $550,000." R. p. 63.

V.

That about the 4th of Dec., 1856, the Company contracted with Bailey Brothers, Liverpool, by C. B. Raymond & Co., their agents in New York, for the purchase of 4,000 tons of iron rail to construct its said railroad, to be delivered in the spring and summer of 1857, to give its notes payable in New York 6, 9 and 12 months, interest at 7 per cent., the notes to be endorsed by C, R. Alton, H. Haertel, Edward Button and D. P. Hull, and give as collateral the bonds issued as aforesaid, at 50 cents on the dollar of said bonds.

TESTIMONY.

Copy of original contract, marked "Exhibit F," attached to deposi- of Joshua Stark. R. p. 85.

Deposition of Joshua Stark: "In the latter part of the year 1856 a contract was made between the Milwaukee & Superior Railroad Company and Bailey Brothers & Co. of Liverpool, through their agents C. B. Raymond & Co., of New York, for the purchase of railroad iron to be delivered in 1857, the railroad company to give its promissory notes for the amount of the purchase money on the delivery of the iron, and the notes to be endorsed by four of the directors of the railroad company, and secured by a deposit of first mortgage bonds of the company as collateral in the proportion of two to one, that is $2,000 in bonds for $1,000 of indebtedness." R. p. 69-

VI.

That the affairs of said company were conducted by a board of seven directors, of whom four were a quorum, and that Alton, Haertel, Button and Hull, were directors of said company when said contract was made that said notes should be given as aforesaid, and that all except Alton continued such directors until after the sale of the road as hereinafter stated.

TESTIMONY.

Sections 4 and 5 of chap. 79 of the Private and Local Laws of 1856, page 127. Copy of records of said railroad company marked "Exhibit I," annexed to deposition of Joshua Stark. R. p. 87.

VII.

During the spring and summer of 1857. the company received under this contract between $60,000 and $70,000 worth of iron, and gave its notes in various amounts at 6, 9 and 12 months, endorsed as per said agreement, by Alton, Haertel, Button and Hull, and put up bonds to double amount of notes.

TESTIMONY.

Testimony of Herman Haertel: "I have been a director of the Milwaukee & Superior Railroad Company. I was elected some time in 1856. In the spring of 1856 I recollect a contract being made by the company with Bailey Brothers & Co., by Raymond & Co., their agents for the purchase of iron. Don't recollect the particulars of the contract. They were paid in notes with first mortgaged bonds of the road as collateral. The notes were endorsed by the principal or resident directors, Mr. Alton, Hull, Button and myself" R. p. 64, 65.

Testimony of Joshua Stark: "During the summer of 1857, a pretty large amount of iron was received under the contract that was made with Bailey Brothers & Co., and notes and bonds delivered therefor. * * * I don't remember exactly the amount of iron received under the contract with Bailey & Bros., but think a thousand tons was received. * * * The bonds had been taken as collateral to the notes at the rate of fifty cents on the dollar."—R. p. 70.

VIII.

In October, 1857, the company failed, and suspended the construction of the work, and being unable to pay their notes, did, with the consent of the endorsers, sur-

render all the iron that was not then laid, and took up the notes and collaterals aforesaid, for the iron thus surrendered: and that C. B. Raymond & Co., agents, extended time 6 months on the notes which were not paid by this surrender of iron, amounting to about twenty-one thousand dollars.

TESTIMONY.

Testimony of Joshua Stark: "In the fall of 1857 the financial crisis compelled a suspension of the construction of the road, and about this time or soon after, an arrangment was made whereby the iron received by the company, but not yet laid, was returned to the agents of Bailey Brothers and Co., and the notes and collaterals of the company given therefor were restored to the company or given up, and in consideration thereof the notes given for the iron already laid were renewed and the time of payment extended, I think for six months; am not sure. The notes thus remaining in the hands of the agents of Bailey Brothers & Co amounted to about $21,000, for which they held as collateral forty-two first mortgage bonds for $1000 each. * * All of the iron was surrendered and returned except what was actually laid—about five miles of track. * * * * I think the company had given notes for iron of the amount of $60,000 and upwards, all of which were surrendered to the company on the return of the iron, and new notes given by the company for about $20,000 of iron. I think the amonnt of iron returned was not far from 800 or 1000 tons. An equivelent amount of the bonds of the company were surrendered. I think the amount of the bonds surrendered was somewhere from $60,000 to $80,000. The bonds have been taken as collateral to the notes at the rate of fifty cents on the dollar. The $20,000 were new notes The old notes were taken up and new notes were given. They were endorsed by the same endorsers as the old notes. I think the work on the road had been suspended at the time the iron was surrendered, and also I think at the time the new notes were given The company was insolvent at this time, I think. It was unable to meet its obligations. The notes and iron were surrendered in the autumn of 1857—I think in October." R. p. 70.

Testimony of Herman Haertel: "The construction of the road was suspended in the fall of 1857. These endorsed notes were not paid when they became due." R. p. 65.

Question. Was there an arrangement made between Bailey Brothers & Co and the (railroad) company by which the former was to take back all of the iron not laid, and surrender the notes endorsed by the directors to that amount and collaterals in proportion?

Answer. "I believe there was such an arrangement made. The notes still held for the iron already laid were extended for six months."

IX.

In April, 1858, about the time the first of the extended notes became due, said 550 of said bonds were held as follows: 42 by C. B. Raymond & Co., as collateral to said endorsed notes; 120 of the said bonds deposited with the city of Milwaukee, to indemnify the city against its bonds loaned to the company; and 100 of said bonds had been cancelled; and the remaining 280 of said bonds were placed in the hands of M. K. Jessup & Co., New York, under a resolution of the board of directors, which resolution is as follows: September 1, 1857: "That until the indebtedness to C. B. Raymond & Co. shall be paid, and the road completed to 27 miles north of Milwaukee, all of said $550,000 in bonds, after deducting $270,000 therefrom, (being 280 bonds,) shall be placed in the hands of Messrs. M. K. Jessup & Co., in trust, not to be delivered by said Jessup & Co., until the trust for which they are placed shall be fully performed and accomplished, said bonds to be sealed up with the joint seals of said company and said C. B. Raymond & Co." That the bonds issued to the city of Milwaukee were unauthorized and not binding as against the said company, having been delivered without consideration; and the only outstanding bonds binding against the company were the 42 bonds held by said Raymond & Co.

TESTIMONY

Testimony of Joshua Stark : "The notes thus remaining in the hands of Bailey Brothers & Co. amounted to about $21,000, for which they held as collateral forty-two first mortgage bonds of $1000 each. Two of the forty-two bonds were in fact delivered to them—the agents—in the spring of 1858 In connection with this arrangement the board of directors of the railroad company, as appears by the record of the company, passed a preamble and resolution providing for a deposit of certain bonds" (See copy of preamble and resolutions passed Sept. 1st, 1857, and marked "Exhibit A," attached to testimony of Joshua Stark) R. p 70

Question—In whose hands were the 550 bonds in April, 1858?

Answer—At the end of April or first of May, 858, one hundred and twenty-eight bonds were deposited with the city of Milwaukee—were pledged to that city ; forty-two were pledged to J Boorman, Johnson & Co. as collateral to the iron notes then outstanding. One hundred were in the hands of Levi Blossom or under his control, and two hundred and eighty were sealed up and deposited with M. K. Jessup & Co., in pursuance with a resolution of the board of September, 1st, 1857. That is all of the bonds that were ever issued.

Question.—Had any resolution been passed at that time, that is prior to May 1st. 1857, in relation to Blossom bonds?

Answer.—Yes A resolution had been passed on the 12 day of April, 1857 It is found on page 115 of the records of the company. It was a resolution cancelling the 100 bonds in the hands of Blossom. See Exhibit "K," to Stark's testimony. R. p. 73.

Testimony of Herman Huertel : "I think the amount of the notes as extended was about twenty thousand dollars. I think the amount of bonds held by Bailey & Brothers as collateral was double the amount of the indebtedness. They held these bonds in April, 1858." R. p. 63.

Question — Do you recollect any, and what arrangement, was made, or resolution passed, in relation to the bonds returned by Bailey Bros. & Co. for the iron surrendered? R., p. 64.

Answer.—"I only can say that there were (280) two hundred and eighty first mortgage bonds of the road held in trust by M. K. Jessup & Co. in pursuance of a resolution of the board of directors passed Sept. 1st, 1857. I don't know whether these bonds were removed from the possession of M. K, Jessup & Co ; I now recollect they were. They were in pursu-

ance of a resolution of the board of directors of the company of March 3, 1859."

See records of U. S. Circuit Court in the case of Farmers' Loan and Trust Company, vs. the Milwaukee & Superior Railroad Company, amended record.

X.

That on the 16th of December, 1856, the company made contract with the Boston Locomotive Works, to purchase rolling stock on credit of 9 and 12 months, and that under this contract the Boston Locomotive Works delivered one engine July, 1857, at $9.000, and one in September, 1857, at $9,000, and the company gave therefor its notes on 9 and 12 months; and these notes are the cause of action upon which the judgment mentioned in the bill was recovered by the Boston Locomotive Works.

TESTIMONY.

Testimony of Holmes Hinckley.

Answer to fifth interrogatory : "I do know that said Boston Locomotive Works entered into a contract with the Milwaukee & Superior Railroad Company for the manufacturing and delivery to said railroad company of locomotive engines. The contract was by correspondence. I wrote a letter bearing date December 12th, 1856, to said Alton in New York, making him a proposition. To this letter Mr. Alton replied." A copy of said letter to Mr. Alton, and a copy of Mr. Alton's reply thereto, both sworn to by said Holmes Hinckley, and marked respectively "G" and "H," hereto annexed. R. p. 111.

See exhibits "G" and "H" to deposition of Holmes Hinckley.

Answer to sixth interrogatory : "All of said locomotive engines were not delivered in pursuance with said agreement. There were two delivered; one in July and one in September, 1857."

Answer to seventh interrogatory : "The Boston Locomotive Works received the Milwaukee & Superior Railroad Company's notes on 9 and 12 months. Said notes were for the price of a Locomotive and tender, and were given on delivery, with interest added at 7 per cent.

Answer to eighth interrogatory: "None of said notes were, or have been paid"

Answer to eleventh interrogatory. "Said Boston Locomotive Works did commence proceedings and recover judgment against said railroad company, which to my knowledge has never been paid or satisfied, and that now the assignees of the Boston Locomotive Works, G. P. Drury and William Page, are the owners thereof, and I believe the said judgment to be one mentioned in the complainants' bill of complaint"

See exhibits "A" and "B" annexed to deposition of Holmes Hinckley, and exhibits "G" and "H," annexed to deposition of Joshua Stark. R. p, 114.

XI

That in the years 1856 and 1857, said company completed about five miles of its road, and had laid down about 500 tons of iron, and owned said two locomotives, worth $18,000, and ten platform cars, worth $6,000—$24,000.

TESTIMONY.

Testimony of Hermann Haertel. R. p., 64.

Question.—At the time the road suspended its work, how much of it, if any, was completed?

Answer.—"About five miles of track laid, from the junction with the La Crosse R. R. I don't know how much grading was done. (The grading was nearly done, I suppose, for eight or nine miles from the junction.) Some little grading was done near Grafton. * * * Two locomotives, ten platform cars, and one hand car were on the road at that time."

Testimony of Joshua Stark: R. p. 71. "The property covered by the mortgage and decree, and sold, as I suppose, consisted of about ten miles of road bed complete, about five miles of track laid with T rail, the requisite ties, chairs and spike used in laying this track, two locomotives and tenders, and I think ten platform cars and franchises of the company, and I believe there was six or eight miles of board fencing along the road. I don't know whether I know the value of the property or not, except approximately. The value of the iron rails, in my opinion, at the time of

the sale, was $40 a ton or more, and there were about 500 tons on the five miles. The value of the chairs and spike I don't know. The locomotives cost the railroad company about $9,000 each. They had been used but little, and were worth little less than cost. The platform cars were worth about $500 apiece.

XII.

That the notes of the company to Raymond & Co., were not paid at maturity, and the endorsers became liable thereon; and before the maturity of the notes. J. Boorman Johnson & Co. had succeeded Raymond & Co. as agents of Bailey Brothers, and as such agents, said J. Boorman Johnson & Co. held the said notes and said 42 bonds collateral; and that about May, 1858, they commenced action on the notes on the law side of this court against the said endorsers.

TESTIMONY.

Testtmony of H. Haertel: "The extended notes were not paid when they became due. A suit was brought against the endorsers, and against the company, I suppose, too. A judgment was entered against the endorsers. R. p. 63.

See Ante No. 8.

XIII.

That pending the action at law against the endorsers, on said notes in the hands of Johnson & Co, the endorsers, (being still directors, and constituting a quorum of the board of directors,) applied to Johnson & Co. to have the mortgage which secured the said 42 bonds foreclosed, which said Johnson & Co. refused to do. That said endorsers, directors, arranged with the Farmers' Loan and

Trust Co., the trustee named in the mortgage, with the consent of Johnson & Co., that a foreclosure should be prosecuted at the risk, and in case of failure, at the expense of said endorsers, directors of said company; and that it should be conducted nominally by the solicitors of Johnson & Co. in the name of the trustee, while the labor and services should be performed by the attorney of said railroad company, under the direction of said endorsers, directors. That in pursuance of this arrangement, the foreclosure suit was commenced in this court about Dec. 13, 1858, in name of the Farmers' Loan and Trust Co. as complainants, purporting to be for the benefit of the holders of the bonds secured by said mortgage, but in fact at the request and for the benefit of said endorsers, directors; that on record, the solicitors of said Johnson appeared to be the solicitors of said Trust Co., but that said suit was in fact prosecuted by and with the joint efforts of the attorney and officers of said company. That the subpoena in said suit was served on the secretary of the company, who was also its attorney, and who as such attorney was assisting in the prosecution of such of such action. No defence was interposed to said foreclosure suit, nor did said directors advise the shareholders that said forclosure suit was pending ; but that said directors aided to facilitate and render effectual said foreclosure suit, for the purpose of benefiting said endorsers, directors, without regard to the interests of stockholders or other creditors of said company.

TESTIMONY.

Testimony of Joshua Stark. R. p. 73.

Question.—Did you ever have any conversation with the attorney of the

trustee in the foreclosure suit, prior to the commencement of the suit, and at what time, in relation to the foreclosure of the mortgage?

Answer.—I had some conversation with Mr. Emmons, the attorney of the holders of the iron notes. He was also the attorney of the trustee after the foreclosure was commenced.

Question.—Was the application from you to foreclose the mortgage, or from him?

Answer.—I, in the interest of some of the directors, and at their request, was seeking to have the mortgage foreclosed for the payment of the iron notes, and these conversations with Mr. Emmons were had with a view to induce his clients to pursue that remedy for the collection of those notes. The directors I speak of were the endorsers of those notes.

Question. What was the object of the directors and yourself, as far as relates to those directors, in desiring to have the mortgage foreclosed?

Answer. It was to release themselves from the payment of those notes by having them paid out of the proceeds of the road. These conversations were had at different times, for from two to three months before the commencement of the foreclosure. I don't (know) of any application being made to the trustee to foreclose the mortgage, except from what Emmons said, and his acting on the authority of the trustee. As to what passed with the trustee I have no knowledge except what may have been reported to me by Mr. Emmons in conversation.

Question. Was not some arrangement made on the part of the directors, by giving security or otherwise, to induce the foreclosure?

Answer. I believe one of the directors did furnish some security for the costs of foreclosure, which was satisfactory to Mr. Emmons. What it was I do not know.

Question. Was not an application (made) by the directors to J. Boorman Johnson & Co. to foreclose the mortgage and make the money in that way; or was not this plan suggested to them by the directors?

Answer. There was. I think I wrote to them myself. I can't remember the date of this letter. I am not sure whether I have a copy of the letter. It was some time in the summer or fall of 1858. Their reply came from their attorney, refusing. I can't give the date of the reply. I should think it was three or four months before the foreclosure suit was commenced.

Question. Was there any arrangement made between the directors of

the road and the attorney of J. Boorman Johnson & Co., or J. Boorman Johnson & Co., or the Farmers' Loan and Trust Co., for the foreclosure of the mortgage; if so, with whom, and what? R. p. 74.

Answer.—There was an arrangement, that I understood to be as follows in substance. That Boorman Johnson & Co., undertook to indemnify the trustee against the expenses of the foreclosure Boorman Johnson & Co. did this upon Mr Haertel furnishing security satisfactory to Mr. Emmons, their attorney, for that purpose, and the foreclosure was to be made and conducted by Emmons, Van Dyke and Hamilton, the attorneys of Boorman Johnson & Co., as attorney for the trustee. The parties to this arrangement, or who concurred in it, were Mr Haertel, acting for the endorsers of the company's notes, and Mr. Emmons, acting for Boorman Johnson & Co., and the trustee, I suppose.

Question.—Was there any understanding about who should perform the labor in foreclosing this mortgage?

Answer.—There was something said about that. I, acting as the friend of Mr. Haertel, and had been the attorney of the company, and was still, and had been assisting Mr. Haertel in these negotiations, and in order to make the expenses of foreclosure, which Mr. Haertel was required to guaranty, as light as possible, it was proposed and understood that I was to perform the principal labor in the foreclosure suit.

Question. Was the foreclosure commenced in pursuance of that arrangement?

Answer. It was.

Question. Who drew the precipe for the issuing of the subpœna?

Answer I have no recollection about it. (Here the witness, at the request of the counsel for the complainant, went to the office of the Clerk of the United States Circuit Court, and examined the record in the foreclosure suit, and testified.) I have just examined the record of the case, and find the precipe is in my hand writing.

Question. On whom was the subpœna served?

Answer. I think it was served on me as secretary.

Question. By whom was the bill drawn in the foreclosure case?

Answer. By me.

Question. By whom was the decree drawn?

Answer. I prepared the draft of the decree.

Question. Was the labor performed by you in pursuance of the arrangement you have spoken of?

Answer. It was.

Question. Was any defence interposed by any of the defendants?

Answer. Some two or three persons were made parties because they had recovered judgments on the value of the right of way. They put in answers, and the decree was drawn so as to preserve their rights. There was no trial.

Question. Was any effort made on the part of the officers of the company to inform the creditors of the company of the foreclosure?

Answer. None was made that I know of.

Question. Was any made on the part of J. Boorman Johnson & Co, or the trustee?

Answer. None that I know of.

Question. Was not everything done that could be done by the endorsers and directors of the company to facilitate and render effectual the foreclosure, for the purpose of benefitting and discharging the endorsers, who were directors, without regard to the interests of the creditors of the company?

Answer. The foreclosure was procured to be made by the endorsers and directors, as I have stated, for the purpose of satisfying the claims against the endorsers held by Boorman Johnson & Co, and I think the directors and endorsers did what they could to render the foreclosure effectual for that purpose, and for the relief of the endorsers, without any reference to the interests of other creditors.

Question Was or was it not the sole and only object of the directors and endorsers in procuring this foreclosure to be made, as it was made, to in some manner dispose of the property of the railroad company so as to protect and discharge the endorsers and directors; if not what was their object?

Answer. That was the object, as I understood it. * * * * *

Question. Did Cross, Ludington & Scott pay you for services in the foreclosure suit?—R. p. 77.

Answer. Well, they paid Emmons, Van Dyke and Hamilton a fee for their services as attorneys in the foreclosure suit, and they, Emmons, Van Dyke and Hamilton, gave me a portion of it.

Testimony of N. J. Emmons: "Mr. Haertel, one of the endorsers, represented to me that he and none of the endorsers had any security for their endorsement. Haertel was anxious instead of pursuing the endor-

sers, that J. Boorman Johnson & Co. should obtain satisfaction of their claims by a foreclosure of the mortgage. J. Boorman Johnson & Co. were averse to bearing the expense of a foreclosure of a mortgage, but preferred to compromise the claim—Mr. Williamson, trustee, required indemnity for the expenses of foreclosure from Johnson & Co., and Johnson & Co. required also to be indemnified for those expenses, and they said that they thought the endorsers ought to indemnify them against the costs of the foreclosure, as it would be for their benefit. Mr. Haertel was aware of the purport of the correspondence between Johnson & Co. and myself, and he undertook with me to pay the expenses of the foreclosure. I took Haertel's word, and Johnson & Co. took my word, and were satisfied, and Williamson took Johnson & Co.'s word, and was satisfied." * * * —R. p. 54.

Question. Did Johnson & Co. pay you for your services in acting for the bond holders; if not, who paid you?

Answer. Johnson & Co. paid me simply for my services in the recovery of the judgments against the railroad company, and the endorsers, Cross, Ludington and Scott, paid me for my services in connection with the foreclosure suit, or Mr Stark and myself jointly for it. Mr. Stark rendered some services in the case."

Testimony of Joshua Stark: *R. p.* 71. "The foreclosure of the mortgage was commenced, I think, in Dec., 1858, in the U. S. District Court. Upon Mr. Haertel guaranteeing the payment of the expenses of the foreclosure, Johnson & Co. assented to the foreclosure, but refused to undertake to purchase the road, as desired by Mr. Haertel, and insisted upon holding the directors as endorsers. They, Johnson & Co., at first refused to accept the additional security of 280 bonds tendered by the resolution before referred to of March, 3d, 1859. Thereupon Mr Haertel commenced negotiating with parties in Milwaukee, and particularly with the defendant Cross, to induce him to purchase the claims of Johnson & Co., and take the collaterals with them and make the amount of the indebtedness out of such collaterals, or the road itself. That negotiation resulted, as I understood from Mr. Haertel, in an agreement, some time in the early part of April, 1859, whereby Cross became the purchaser of all the notes, including those in judgment, from Johnson & Co., and to make payment of those claims exclusively out of the securities therefor which he should derive from Johnson & Co by the purchase. To facili-

ate this purchase—to authorize it to be made, the resolution of April 21st, 1859, (exhibit "C," Stark's testimony,) before referred to, was passed. Between that time and the 17th of May, 1859, the transfer was effected by Johnson & Co. to Cross."

Deposition of Isaac H. Knox.

Answer to eight interrogatory.—"My firm gave directions to Emmons and Van Dyke, our attorneys at Milwaukee, to commence proceedings in the U. S. District Court for Wisconsin, on the notes which were sent to us by Bailey Brothers & Co., against all of the parties to said notes. Through our attorneys at Milwaukee, our firm, as the agents of Bailey Brothers & Co., were requested to procure the foreclosure of the mortgage given by the Milwaukee & Superior Railroad Company to the Farmer's Loan & Trust Company, as security for the payment of their bonds. I don't know at whose instance, nor for what purpose, the request was made. We thereupon applied to the Farmer's Loan & Trust Company, and requested them to foreclose the mortgage. They declined to do so, but said that we might use their name in such foreclosure, if we pleased I communicated this answer to our attorneys in Milwaukee, but do not know what was done thereupon." R., p. 96.

XIV.

After the commencement of the foreclosure suit, the directors, endorsers, endeavored to find some one who would purchase the claims of Johnson & Co., and the bonds held as collateral thereto, and release the endorsers from all liability on said notes; and about March, 1859, and while the 280 bonds remained under seal with Jessup & Co., the directors, endorsers, on the one part, and the defendants, Cross, Ludington & Scott, of the second part, entered into a fraudulent and corrupt agreement, by which said Cross, Ludington & Scott, agreed to purchase up said claims and collaterals held by Johnson & Co., and release said directors, endorsers, therefrom; and the said directors, endorsers, on their

part agreed, by means of said foreclosure suit, to give said Cross, Ludington & Scott title to all the railroad, property, franchises and rolling stock of the company, and to insure this result the said directors, endorsers, agreed to procure said 280 bonds then under seal in the hands of Jessup & Co., to be transferred to Johnson & Co. as further collateral security to said indebtedness held by Johnson & Co., and that at the time of the decree in said foreclosure case, March 19, 1859, and for several weeks thereafter, said Johnson & Co. refused to receive said 280 of said bonds, and did not in fact receive them till after the negotiation was settled between them and Cross, Ludington & Scott; and in pursuance of said agreement, said endorsers, directors, on the 3d of March, 1859, without any request or consideration from Johnson & Co., and without the knowledge of said Johnson & Co., caused a resolution to be passed by said board of directors, directing that said bonds so deposited with Jessup & Co. should be transferred to said Johnson & Co., as additional collateral security for the payment of said notes: and said 280 of said bonds were accordingly so delivered to said Johnson & Co.; and that afterwards, Cross, Ludington & Scott purchased the claims held by Johnson & Co., and said collaterals, for about $14,000.

TESTIMONY.

Testimony of Joshua Stark, on re-examination. R., p. 75.

"*Question.*— Do you know whether or not the endorsers and directors made any application to any, and what person or persons, to induce them to purchase of J. Boorman Johnson & Co., the claims held against the endorsers and directors, together with the collaterals? If so, state it.

Answer. I have no knowledge upon the subject.

Question. Have you ever been informed by any of the directors that that was the case?

Answer. Yes sir. I have been told by Mr. Haertel that he had spoken to two or three different persons upon the subject of making such purchase

Question. Did he tell you whether he had completed any such arrangement or not, and if so, what?

Answer. He informed me that among others he had spoken to the defendants, Cross, Ludington and Scott, or some of them, and they had agreed to make the purchase.

Question. What was the terms of that agreement or purchase?

Answer I don't know how much they were to give for the claim They were to obtain all of the collaterals which had been held by Boorman, Johnson & Co., together with the 280 bonds which had been deposited with M. K. Kessup & Co. under the resolution of September 1st, 1857, and I think it was understood that on their obtaining possession of all of those bonds pledged to secure these claims, they, Cross, Ludington & Scott, were to make their money out of the railroad, and hold the endorsers harmless

Question. Was the resolution of March 3d, 1859, (Exhibit "B" to Stark's testimony,) passed in pursuance to that agreement?

Answer. My answer to that would be that my present recollection is, that I was informed by Mr. Haertel of his arrangement with Cross, Ludington & Scott, or at least of negotiations with them, with a view to such arrangement, before the adoption of the resolution of March 3d, and that the resolution was adopted to facilitate the negotiations.

Question Do you recollect the resolution of April 21st, 1859? (Exhibit "C" to Stark's testimony?

Answer. Yes sir. It is on page 125 of the records.

Question Was that passed in pursuance of this understanding and agreement you have spoken of?

Answer. It was.

Question. Was it any part of that agreement that judgments should be entered by confession on the notes endorsed by the directors not then in suit?

Answer. Yes, I think it was a part of the arrangement at the time, that judgments were to be entered up against both company and endorsers, on all the notes held by J. Boorman Johnson & Co., without further litigation. A resolution was passed by the board, and is recorded on page 124

of the records, (exhibit "J" to Stark's testimony,) authorizing me, as att rney of the company, to confess judgment on those notes.

Question. Do you know whether in fact judgments were entered in the manner prescribed in that resolution?

Answer. Yes sir, they were.

Question. Was it not a part of that agreement also that the endorsers and directors should aid and assist the defendants, Cross, Ludington & Scott, to secure a perfect title to the outstanding bonds held by J. Boorman Johnson & Co and the 280 bonds held by M. K, Jessup & Co.?

Answer. I don't think it was definitely understood whether Cross, Ludington & Scott should hold the bonds as collateral, or should acquire title to the same as owners; that is to say, prior to their coming into possession of the bonds.

Question. Was or was it not a part of that agreement, that the endorsers and directors should aid and assist Cross, Ludington & Scott in perfecting a title to all of the railroad property by virtue of that foreclosure?

Answer. I think it was.

Question. When Johnson & Co. were first applied to to receive the 280 bonds, did they consent to receive them, or refuse?

Answer. I had no direct communication with them on the subject, but I think Mr. Emmons, their attorney, informed me that they declined to receive them.

Question. What induced them afterwards to accept?

Answer. The sale to Cross, Ludington & Scott. I understood that they declined to receive them until after they had negotiated the sale.

Question. Was there any consideration for the transfer from the railroad company to Johnson & Co.?

Answer. None of which I have any knowledge.

Question — Did Cross, Ludington & Scott pay you for your services in the foreclosure suit?

Answer.— Well, they paid Emmons, Van Dyke and Hamilton a fee for their services as their attorneys in the foreclosure suit, and they, Emmons, Van Dyke and Hamilton gave me a portion of it. Cross, Ludington & Scott did not recognize me as having any claim upon them directly for services, but knew that I was to receive a part of the compensation paid Emmons, Van Dyke and Hamilton.

Question — Did the 280 bonds deposited with M. K. Jessup & Co. contain any, and how many of the bonds surrendered by Bailey Bros. & Co. as collateral to the notes surrendered?

Answer.—They did not embrace any of these. I am confident they did not." R., p. 73.

Testimony of Herman Haertel. R., p. 64.

"*Question.*— Do you recollect if any, and what arrangement was made, or resolution passed, in relation to the bonds returned by Bailey Bros. & Co. for iron surrendered.

Answer—I can only say that there was (280) two hundred and eighty first mortgage bonds of the road held in trust by M. K Jessup & Co., in pursuance of a resolution of the board of directors, passed Sept. 1st, 1857. I don't know whether the bonds were removed from the possession of M. K, Jessup & Co. I now recollect they were. They were in pursuance of a resolution of the board of directors of the company of March 3d, 1859. The intention of the directors in transferring the bonds from M. K. Jessup & Co. to J. Boorman, Johnson & Co was for the purpose of protecting the endorsers on their notes, and as a further collateral to Johnson & Co; The endorsers of these notes were the directors I don't know of any consideration having passed from J. Boorman Johnson & Co. to the company, for the transfer of these bonds formerly held by M. K. Jessup & Co. I don't recollect of J Boorman Johnson & Co. making any request for the transfer of these bonds from M. K. Jessup & Co.

Question. Did you at any time after the suits were commenced against the endorsers have any conversation with any person, and who, in relation to purchasing the judgments and claims of J. Boorman, Johnson & Co. against the endorsers, and the collaterals?

Answer Yes, I had. I spoke to Mr. Brodhead, Mr Holton, and also to Mr. James Ludington; also had conversation with Mr. Emmons about it. I don't recollect precisely the time these conversations commenced. It was after the first trial. These conversations were probably one or two months before the purchase of the judgments by Cross, Ludington & Scott. * * I had one or two conversations with Scott; also had a conversation with Scott and Ludington together. * * * *

Question. In talking with Ludington and Scott, what were you desires and intentions in relation to yourself?

Answer. It was my desire to get released from my liabiiity as endorser.

Question. When the judgments were purchased by Cross, Ludington & Scott, what action did they take in reference to your hability?

Answer. They release me. as I was informed by my attorney."

Testimony of N. J. Emmons.

Question. Did you draw the resolution authorizing the delivery of the 280 bonds held by M. K. Jessup & Co. to Johnson & Co., or did you know anything about it? R., p. 60.

Answer. I knew about the resolution. I don't know whether I drew it or not. All of my present recollection is, without referring to documents or papers, that the first knowledge I had in regard to these bonds, came from the officers of the railroad company. My own impressions at this time are that I did draw the resolutions. I drew some at one time. I have before stated that I drew some resolutions, without referring particularly to these. If I did draw them, the originals are probably in existence in my hand writing. The proposition for the transfer of these bonds came from the officers of the company. I may have drawn the resolutions with the view of my clients' action npon them; but whether I did or not I can't remember * * * The officers of the company, who made the proposition for the transfer of the bonds, were Mr. Stark and Mr. Haertel.

Question. Who drew the assignment from Johnson & Co. to Cross, Ludington & Scott.

Answer. I think I did, myself; or, at least, it was drawn under my supervision, in my office, by my clerk.

Question. Did you forward it to them for execution?

Answer. I did, either personally or through my clerk.

Question. Was it returned to you by them?

Answer. It was.

Question. Were any other papers returned with it, and what?

Answer. I can't tell. I presume by reference to the correspondence, which I have not consulted, I might. There must have been a letter accompanying the assignment, that would tell.

Question. Were the bonds held by Johnson & Co. sent you?

Answer. Yes, they were sent by express. They did not accompany the letter. The letter perhaps stated that they were sent by express.

Question Did you receive the bonds from Johnson & Co. about the

time you received the assignment from them, and soon after the assignment bears date?

Answer My present recollection is that I did; at or about that time. The precise date can be ascertained of the express company.

Question. Were they the bonds mentioned in the resolution of March 3d, 1859?

Answer. I think they were, if March 3d was the date of the resolution. I think I examined at the time, before I assumed control of them, and found they were. They were intended to be, and were the bonds mentioned in the assignment, so far as they could be identified by numbers and description.

Question. What did you do with the bonds?

Answer. I delivered them to Mr. Cross, the assignee of the judgments. The personal delivery was to Mr. Scott, to which Mr. Cross and Ludington assented.

Deposition of Isaac H. Knox. R. p. 84.

Answer to seventh interrogatory.—"In or about the month of May, 1859, my firm (J. Boorman Johnson & Co.,) received from M. K. Jessup & Co. a sealed parcel, represented by them to contain certain bonds of the Milwaukee and Superior Railroad company, which they delivered to us pursuant to a resolution of the company of March 3d 1859. We sent this sealed parcel at once to Emmons and Van Dyke, our attorneys at Milwaukee."

See copy of assignment, annexed to testimony of N. J. Emmons, dated May 5th, 1859.

XV.

That afterwards, on the 17th of May, 1589, Cross, Ludington & Scott, in pursuance of said fraudulent agreement, proposed to the board of directors, of which said endorsers were then a quorum, to purchase and become the absolute owner of the said 322 bonds, (being said 42 bonds held by said Johnson & Co., and said 280 bonds assigned as aforesaid,) and offering as consideration of

such purchase to discharge said endorsers, directors; and in response the board of directors, by procurement of said endorsers, directors, on said 17th day of May, 1859, passed a resolution authorizing the sale of said 322 bonds on notice of not less than five days, on condition that Cross, Ludington & Scott, should bid a sufficient amount therefor to satisfy said indebtedness of said endorsers; that this was done with full knowledge that said bonds had no market value, and for the purpose of advancing and concealing the true object of the parties; and in pursuance of said scheme, on the 20th day of May, 1859, a notice appeared in *The Milwaukee News*, printed in small type in an obscure part of the paper, without date or signature, as follows:

NOTICE.

THREE hundred and twenty-two thousand dollars of the first mortgage bonds of the Milwaukee & Superior Railroad Co., will be sold at auction on Saturday, the 28th of May, instant, at 12½ P. M., at the Chamber of Commerce. may 20—6dt

And that without further notice said 322 bonds were offered for sale, and a pretended sale thereof made on the 28th of May, 1859, to said Cross, for the nominal sum of $70 for each bond of $1,000, or $22,540 in all, being about the amount due against said endorsers, directors; that Cross was the only bidder at said sale; and that he bid them for the benefit of Cross, Ludington & Scott.

That in said foreclosure suit, decree of sale was made on the 19th of March, 1859, and in said decree it was referred to a Master to take an account of the outstanding bonds of said railroad company, secured by said mortgage, and to ascertain the amount due thereon for principal and interest; and the number and amount of said

bonds held as collateral security to debts of said railroad company; and that before said Master said Cross, Ludington & Scott presented said 322 bonds, and claimed to be the absolute owners thereof, and that the same were an indebtedness from said company to them to the amount of $322,000, and said directors, endorsers, fraudulently permitted and procured the same to be admitted and allowed, as though the same were such real indebtedness against said company.

TESTIMONY.

See proposition and resolutions annexed to testimony of Stark, and marked exhibit "H." R. p. 87.

Testimony of Cyrus F Huntsman: R. p. 66. "The notice was published in the in 4th column of the Milwaukee News, on the 20th of May, 1859, which was the first publication. It was not published on the same page on the 21st of May, 1859, but on the bottom of the first column of the 2nd page On the 22nd of May, 1859, it was published in the same place. On the 24th of May, 1859, it was published in same paper, on 1st column of 4th page, near the bottom. On 25th of May, 7, 1859, it was published in 5th column of 3d page, near the bottom It was published on the 26th, 27th, and 28th, and 29th, and 30th of May, in same paper, in 5th column of 3d page, near the bottom. * * The notice now attached to this, my deposition, is a printed copy of the notice referred to."

NOTICE.

THREE hundred and twenty-two thousand dollars of the first mortgage bonds of the Milwaukee & Superior Railroad Co., will be sold at auction on Saturday, the 28th of May instant, at 12½ P. M., at the Chamber of Commerce. may20-6t.

Testimony of N J Emmons: R. p. 11.

Question. Were these the same bonds (the 280 bonds) that were subsequently sold at auction at the chamber of commerce?

Answer. I think I may safely say they were. All parties acted on the supposition that they were the same indentical bonds.

Question. Who acted as auctioneer at that sale of the bonds?

Answer. I don't know whether we had a professional auctioneer or not, but to all intents and purposes I believe I was the auctioneer myself.

Question. Were they sold in pursuance of the notice published in the Milwaukee News ?

Answer. They were. I drew the notice, and advised Mr. Cross to publish it in the Daily News.

Testimony of Joshua Stark : "After the passage of the resolution of May 17th, 1859, the 322 bonds received by Mr. Cross from Johnson & Co., were sold at the chamber of commerce in Milwaukee at auction, and were bid off by Mr Cross at 7 cents on the dollar." R. p 71.

See the decree in the case of The Farmers' Loan and Trust Company vs The Milwaukee & Superior Railroad Company, records of the U. S. District Court Chancery I, page 495.

See also report of Master, in the same case.

Question. When these 280 bonds were presented before the master for allowance in favor of Cross, Ludington & Scott, was any defence made to their allowance by the directors of the company, or its attorney ? R. p 77.

Answer. There was not.

Question. Were the directors and endorsers aware of the fact that these bonds were presented by Cross, Ludington & Scott to the master for allowance as their own absolute property ?

Answer. I can't say whether they were or not. After that sale the directors didn't care anything about the matter, as the judgments against them had been discharged.

Question. Were you aware of the fact, and did you make any objection as attorney of the company ?

Answer. I was. I made no objection.

XVI.

That before the first day of June, 1859, judgments had been obtained against said endorsers, directors, and in pursuance of said corrupt agreement, on the 1st day of June, 1859, said judgments were all caused by said Cross, Ludington & Scott to be discharged of record.

TESTIMONY.

See Judgment Record B of U. S, District Court, January 22d, 1859, and April 28th, 1859,

Testimony of Herman Haertel. R. p. 64.

Question. In talking with Ludington and Scott, what were your desires and intentions in relation to yourself?

Answer. It was my desire to get released from my liability as endorser.

Question When these judgments were purchased by Ludington, Cross & Scott, what action did they take in reference to your liability?

Answer. They released me, as I am informed by my attorney.

Testimony of N J. Emmons: R. p 61.

Question At the time this sale of the bonds was made, were all of the notes in judgment against the endorsers?

Answer. I could not tell without reference to documents. My impression is that (they) were all in judgment.

Question. Were not those judgments discharged of record within a very short time after the auction sale of those bonds?

Answer. I don't remember. I should say yes, but the record will speak for itself.

Question. If discharged, in pursuance of what arrangement were they discharged?

Answer. I know of no arrangement (other) than that which was contemplated and proposed by Mr Cross in his communication to the company, and which I think was referred to in my examination of October last.

Question. Was any money paid by the endorsers and judgment debtors to procure the discharge of those judgments?

Answer. I don't know.

Question. Was any paid to your firm to your knowledge?

Answer. There was none.

Question. By whose request were the judgments discharged?

Answer. I have no personal recollection of discharging the judgments myself. I am informed they are discharged of record. I think it must have been by Mr. Hamilton, my partner, and presume he did so at the request of Mr. Cross.

Testimony of Joshua Stark: R. p 77.

Question. What, if any knowledge have you in relation to the discharge of the judgments against the endorsers on those iron notes?

Answer. I went with Mr. Hamilton, of the firm of Emmons, Van Dyke & Hamilton, to the office of the clerk of the U. S. District Court, and was present while he discharged the judgments on the judgment docket,

Question. Was any money paid by the endorsers for the purpose of procuring such discharge, or did any consideration pass from them to procure the same?

Answer. None of which I have any knowledge.

Question. Would you have known the fact if any had been paid?

Answer. I think I should.

Question. How, then came Emmons, Van Dyke & Hamilton to discharge these judgments?

Answer. They were discharged because Cross, Ludington & Scott had become the purchasers of the 322 bonds pledged to them, at the public sale, and the discharge of the judgments was the payment for those bonds.

XVII.

That in pursuance of said agreement all the rail and property of said company, were sold under the decree obtained in said foreclosure suit on the 27th day of August, 1859; that said Cross, Ludington & Scott were the only bidders, and purchased the same for $20,100; and after deducting the expenses of the sale, amounting to about $1,500, the balance of said purchase money was returned to said Cross, Ludington & Scott.

TESTIMONY.

See marshal's report of sale in the suit of The Farmers Loan and Trust Company vs. The Milwaukee & Superior Railroad Company, Chancery I, page 495, and receipts on distribution in clerk's office in same case.

Testimony of James B Cross. R., p. 67.

Question. Do you recollect the sale by the marshal of the property of the Milwaukee & Superior Railroad Company?

Answer. I do; I was present.

Question. Do you know who purchased the road, engines, and all the property sold?

Answer. I do. I did. I bought for myself and the defendants, Ludington and Scott.

Testimony of Herman Haertel. R. p. 64.

Question. In talking with Ludington and Scott, what were your desires and intentions in relation to yourself?

Answer. It was my desire to get released from my liability as endorser.

Question. When these judgments were purchased by Ludington, Cross & Scott, what action did they take in reference to your liability?

Answer. They released me, as I am informed by my attorney.

Testimony of N. J. Emmons: R. p. 61.

Question. At the time this sale of the bonds was made, were all of the notes in judgment against the endorsers?

Answer. I could not tell without reference to documents. My impression is that (they) were all in judgment.

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Answer. I don't remember. I should say yes, but the record will speak for itself.

Question. If discharged, in pursuance of what arrangement were they discharged?

Answer. I know of *no arrangement (other)* than that which was contemplated and proposed by Mr. Cross in his communication to the company, and which I think was referred to in my examination of October last.

Question. Was any money paid by the endorsers and judgment debtors to procure the discharge of those judgments?

Answer. I don't know.

Question. Was any paid to your firm to your knowledge?

Answer. There was none.

Question. By whose request were the judgments discharged?

Answer. I have no personal recollection of discharging the judgments myself. I am informed they are discharged of record. I think it must have been by Mr. Hamilton, my partner, and presume he did so at the request of Mr. Cross.

Testimony of Joshua Stark: R. p. 77.

Question. What, if any knowledge have you in relation to the discharge of the judgments against the endorsers on those iron notes?

Answer. I went with Mr. Hamilton, of the firm of Emmons, Van Dyke & Hamilton, to the office of the clerk of the U. S. District Court, and was present while he discharged the judgments on the judgment docket,

Question. Was any money paid by the endorsers for the purpose of procuring such discharge, or did any consideration pass from them to procure the same?

Answer. None of which I have any knowledge.

Question. Would you have known the fact if any had been paid?

Answer. I think I should.

Question. How, then came Emmons, Van Dyke & Hamilton to discharge these judgments?

Answer. They were discharged because Cross, Ludington & Scott had become the purchasers of the 822 bonds pledged to them, at the public sale, and the discharge of the judgments was the payment for those bonds.

XVII.

That in pursuance of said agreement all the rail and property of said company, were sold under the decree obtained in said foreclosure suit on the 27th day of August, 1859; that said Cross, Ludington & Scott were the only bidders, and purchased the same for $20,100; and after deducting the expenses of the sale, amounting to about $1,500, the balance of said purchase money was returned to said Cross, Ludington & Scott.

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Question. Do you know who purchased the road, engines, and all the property sold?

Answer. I do. I did. I bought for myself and the defendants, Ludington and Scott.

Testimony of Herman Huertel. R. p. 64.

Question. In talking with Ludington and Scott, what were your desires and intentions in relation to yourself?

Answer. It was my desire to get released from my liability as endorser.

Question When these judgments were purchased by Ludington, Cross & Scott, what action did they take in reference to your liability?

Answer. They released me, as I am informed by my attorney.

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Answer. I have no personal recollection of discharging the judgments myself. I am informed they are discharged of record. I think it must have been by Mr. Hamilton, my partner, and presume he did so at the request of Mr. Cross.

Testimony of Joshua Stark: R. p 77.

Question. What, if any knowledge have you in relation to the discharge of the judgments against the endorsers on those iron notes?

Answer. I went with Mr. Hamilton, of the firm of Emmons, Van Dyke & Hamilton, to the office of the clerk of the U. S. District Court, and was present while he discharged the judgments on the judgment docket,

Question. Was any money paid by the endorsers for the purpose of procuring such discharge, or did any consideration pass from them to procure the same?

Answer. None of which I have any knowledge.

Question. Would you have known the fact if any had been paid?

Answer. I think I should.

Question. How, then came Emmons, Van Dyke & Hamilton to discharge these judgments?

Answer. They were discharged because Cross, Ludington & Scott had become the purchasers of the 322 bonds pledged to them, at the public sale, and the discharge of the judgments was the payment for those bonds.

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Question. In talking with Ludington and Scott, what were your desires and intentions in relation to yourself?

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Answer. There was none.

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Answer. I have no personal recollection of discharging the judgments myself. I am informed they are discharged of record. I think it must have been by Mr. Hamilton, my partner, and presume he did so at the request of Mr. Cross.

Testimony of Joshua Stark: R. p 77.

Question. What, if any knowledge have you in relation to the discharge of the judgments against the endorsers on those iron notes?

Answer. I went with Mr. Hamilton, of the firm of Emmons, Van Dyke & Hamilton, to the office of the clerk of the U. S. District Court, and was present while he discharged the judgments on the judgment docket,

Question. Was any money paid by the endorsers for the purpose of procuring such discharge, or did any consideration pass from them to procure the same?

Answer. None of which I have any knowledge.

Question. Would you have known the fact if any had been paid?

Answer. I think I should.

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Answer. They were discharged because Cross, Ludington & Scott had become the purchasers of the 322 bonds pledged to them, at the public sale, and the discharge of the judgments was the payment for those bonds.

XVII.

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Question. Do you recollect the sale by the marshal of the property of the Milwaukee & Superior Railroad Company?

Answer. I do; I was present.

Question. Do you know who purchased the road, engines, and all the property sold?

Answer. I do. I did. I bought for myself and the defendants, Ludington and Scott.

Testimony of N. J. Emmons. R., p. 62.

"*Question.* Did you or or your firm receive Clerk of U. S. District Court of Wisconsin, the amount of money going to the bondholders after paying the expenses of the foreclosure suit?

Answer. No money passed through my, or my firm's hands. The money was reported to be in the registry of the Court, and I presume the ordinary course was pursued in paying over to the attorney of record by drawing checks to our order, and we immediately passed the checks over to the parties entitled. This is the ordinary course pursued in the distribution of proceeds in like cases.

Question. To whom was the check for the amount due the bondholders passed?

Answer. My present recollection (is), there was nothing awarded to any one but Cross, Ludington & Scott, and I presume the check was passed to them."

XVIII.

That Cross, Ludington & Scott were, during all the negotiations aforesaid, aware of the indebtedness of the Boston Locomotive Works against said company, and the insolvency of said company.

TESTIMONY.

Testimony of Joshua Stark. R., p. 78.

Question. Did you have frequent, or any conversation with Emmons, Van Dyke & Hamilton and Mr. A. R. B. Butler, both before and after the assignment from Johnson & Co. to Cross, Ludington & Scott, in relation to the purchase by Cross, Ludington & Scott of Johnson & Co. of the indebtedness held by them against the endorsers and directors of the the company?

Answer. Yes. I talked with Mr. Emmons and Mr. Butler on the subject.

Question. During any of these conversations with Emmons and Butler was the indebtedness of the railroad company to the Boston Locomotive Works mentioned or spoken of?

Answer. In some of those conversations a suit then pending in the

Circuit Court of Milwaukee county, brought by the Boston Locomotive Works against the railroad company, to recover the locomotives which they had sold and delivered to the company, was spoken of.

Question. Were not the chances of recovery in that case taken into consideration, and into the calculation in making the sale and transfer from Johnson & Co. to Cross, Ludington & Scott?

Answer. I think they were. I informed Mr. Butler, I am sure, and I think Mr. Emmons, of the character and condition of that suit.

Question. Who was the attorney for the defendants, in the suit of the Boston Locomotive Works against the railroad company?

Answer. I was.

Question. Were you acting as the attorney of the railroad company at the time the suit was commenced and the answer put in?

Answer. I was.

Question. Did you continue to conduct the defence of that suit after the sale of the locomotives on the foreclosure, as the attorney for the railroad company, or how otherwise?

Answer. I continued to act as attorney in the defence of that suit until it was discontinued, the winter following. After Cross, Ludington & Scott purchased the claims of Johnson & Co., Mr. Butler spoke with me about that suit, and desired me to continue to defend it, as involving a part of the property covered by the mortgage.

Question. In what capacity was Mr. Butler acting in making this request?

Answer. He assumed to be acting as the attorney of Cross, Ludington & Scott.

Question. In those conversations had with Mr. Butler, was he acting, or pretending to act as the attorney of Cross, Ludington & Scott?

Answer. He was pretending to act as their attorney, and I suppose he was their attorney.

Question. Were those conversations had on the part of Mr. Butler to ascertain the pecuniary condition of the road, and the chances of making anything by buying the claims of Johnson & Co.?

Answer. I think his object was to ascertain the value and extent of the property covered by the mortgage, and the amount and character of the claims secured by the mortgage, or by the mortgage bonds."

Testimony of N. J. Emmons: R., p. 56. "I have stated that I did

not know whether they (Cross, Ludington & Scott) did take other advice. I know that they did take other advice. Mr. Butler came to my office and looked the whole matter over, and agreed with me that it was perfectly safe to purchase, and it was upon his advice that the purchase was made.

XIX.

That the property thus obtained by Cross, Ludington & Scott, was worth $70,000 to $100,000, and only in fact cost them about $15,000; and that immediately thereafter they sold the rolling stock, rails and chairs purchased by them as aforesaid for about $40,000 leaving in their hands in cash, over what they paid therefor, $25,000, besides the franchises of said company.

TESTIMONY.

Testimony of Joshua Stark: R., p. 71. "The property covered by the mortgage and decree, and sold, as I suppose, consisted of about ten miles of road bed complete, about five miles of track laid with T rail, the requisite ties, chair and spikes used in laying this track, two locomotives and tenders, and I think ten platform cars and franchises of the company, and I believe there was some six or eight miles of board fencing along the road. I don't know whether I know the value of the property or not, except approximately- The value of the iron rails, in my opinion, at the time of the sale, was $40 a ton or more, and there were about 500 tons on the five miles. The value of the chairs and spike I don't know. The locomotives cost the railway company about $9,000 each. They had been used but little, and were worth a little less than cost. The platform cars were worth about $500 apiece."

Testimony of Hermann Haertel. R., p. 64.

"*Question.* At the time the road suspended its work, how much of it was completed?

Answer. About five miles of track laid from the junction with the La Crosse R. R. I don't [know] how much grading was done. The grading was nearly done, I suppose, for eight or nine miles from the junction. Some little grading was done near Grafton. As far as I recollect, some fifteen or twenty thousand dollars had been paid for right of way, I

am not certain about this. Was several platform cars, two locomotives, ten platform cars and one hand car on the road at that time [time of sale]."

Testimony of B. H. Edgerton: "I am a civil engineer. I was acquainted with the price of materials for building railroads before and subsequent to 1859. R., p. 79.

Question. What in your opinion, was the value of chairs for laying railroad track at that time?

Answer. The common wrought chair was at that time worth from three to three and half cents a pound.

Question. How many tons of chairs to the mile are used in laying track?

Answer. About five thousand pounds per mile.

Question. What, then, would the chairs be worth per mile?

Answer. From one hundred and fifty to one hundred and seventy-five dollars per mile.

Question.— What would the spikes be worth per mile used in Laying track?

Answer.— About the same.

Questions.— What would the ties be worth per mile?

Answer.— About $660.

Question — What is the common board fence, such as is put on both sides of the road, worth to take down and put in another place?

Answer.— About $160 per mile.

Question. What is the value of the franchises of the Milwaukee & Superior Railroad Company through this city (Milwaukee)?

Answer. I think it valuable, but could not state a definite sum which it would be worth.

Testimony of Samuel B Scott. R., p. 68.

Question. Who now owns the property purchased by Mr. Cross at that (the Marshal's) sale?

Answer. I don't know.

Question. Do you know any of it?

Answer I don't know as I do, at the present time. I mean to except the franchises. Those I suppose we still own. We sold the rest of the property. Most of it was sold by J. V Ayer, of Chicago. The property sold consisted of the iron, chairs, spike, two locomotives, and I think ten flat cars.

Question. For what amount was the property sold?

Answer. I haven't the figures to state the precise amount. I should think it was in the neighborhood of $30,000. (It) may have been a trifle over, a $1000 or $2000. Think Ayer sold all the property except fifty tons of iron, which I sold. I received $45 a ton for the iron I sold. I don't know how many tons of iron there were in all.

Question. Was the consideration named in the assignment from J. Boorman Johnson & Co to Cross, the actual consideration paid for the assignment of the judgments and collateral bonds?

Answer. Yes, I think it was.

See copy of assignment, attached to testimony of N. J. Emmons.

Testimony of James B. Cross: "My impression is that the property sold (locomotives, iron, chairs, etc..) brought over thirty thousand dollars"

Deposition of Isaac H. Knox. R., p. 96.

Answer to eleventh interrogatory: "My firm, on the fifth day of May, 1859, assigned to James B. Cross, of Milwaukee, all the judgments we had obtained on account of Bailey Brothers & Co, for the sum of thirteen thousand three hundred and eighty dollars and twenty cents. I refer for all particulars, to the original assignment, which is doubtless on record We received payment in cash. but I am not sure that it was exactly the sum above named. Our assignment transferred the collateral securities, together with the judgments against all of the parties."

The main facts of this case shown by the bill and established by proofs, are, that the Milwaukee & Superior Railroad Company in December, 1858, was thoroughly insolvent; that a first mortgage had previously been executed by said company to secure bonds amounting to $550,000; that only $42,000 of said bonds were actually outstanding, which were in the hands of Boorman Johnson & Co. for the benefit of Bailey Brothers & Co., who were creditors of the company to the amount of about $20,000, secured by notes of the company endorsed by four of the directors, being a majority and *quorum* of the board. That $280,000 of said bonds had never been issued, but were deposited with M. K. Jessup & Co. *not to be issued*, until twenty-seven miles of the road of said company should be completed, and the claim of Bailey Brothers & Co. should be paid; so that said $280,000 bonds constituted no indebtedness against said Company.

In May, 1858, actions were commenced against the directors on their endorsements; whereupon these directors, being a majority of the board, and controlling the corporation, procured a foreclosure suit to be commenced on the mortgage for the purpose of making the claim of Bailey Brothers & Co. out of the $42,000 bonds held by them as collateral security. The parecipe and bill were drawn and filed by the Secretary of said company, who was also the attorney of the company, and one of its directors, but in the name of other attorneys; the subpoenae, when issued, was served upon the secretary and attorney of the company who had really commenced the suit; the company made

default; and on the 19th March, 1859, the court made decree taking the bill as confessed and referring it to a master to compute and report the amount due. The bill alleged that $128,000 of the bonds had been issued to the city of Milwaukee and $42,000 of said bonds were held as collateral to said claim of Bailey Brothers & Co.; but the bill did not state that said $280,000 bonds deposited with M. K. Jessup & Co. had ever been issued by the company and asked no relief in relation thereto.

Pending this foreclosure suit and before the decree, these four directors entered into a scheme and combination with the defendants, Cross, Ludington & Scott, by which they were to purchase the Bailey Brothers & Co. claim, to protect these directors from their endorsement; and in consideration thereof, the directors agreed to aid Cross, Ludington & Scott to acquire *the entire property of the company.* This is fully shown by testimony, *Record, p.* 76, 71. In pursuance of this plan, the directors caused said $280,000 bonds in hands of M. K. Jessup & Co. to be delivered to Boorman Johnson & Co. as pretended additional collateral security to said $20,000 indebtedness to Bailey Brothers & Co. When this was first proposed, Boorman Johnson & Co., doubtless knowing that such transfer was fraudulent, *refused to receive them. R. p.* 76. And never did receive them until after they had negotiated a sale of the Bailey Brothers & Co. claim to said Cross, Ludington & Scott. *R. p.* 76, 77, *also p.* 60, 96. The claim was in fact assigned to Cross, Ludington & Scott, May 5th, 1859: and these $280,000 bonds were not delivered to Boorman Johnson & Co. until about that time, long after the decree in the foreclosure suit. *R. p.* 96,

82, 83, 84. Cross, Ludington & Scott purchased the Bailey Brothers & Co. claim against the company for $13,380.20 *R. p.* 96, 82, 83; and received as collateral thereto the $42,000 bonds originally deposited as collateral security to said claim, and also the $280,000 bonds before mentioned.

Cross, Ludington & Scott , after obtaining possession of these bonds, $322,000 in all, pretended to sell them at public sale, with the consent of the company, and to become the absolute owners thereof. R. p. 81, 82, 66. But it must be remembered that however fair this part of the transaction may appear upon its face, it was part of a previously concerted plan to accomplish a fraudulent result; that the guilty directors constituted a majority and quorum of the board of directors of the company; and that the pretended agreement between the company, and Cross, Ludington & Scott, was really an agreement between these parties and said directors, all of whom were parties to the previously concerted plan of giving Cross, Ludington & Scott all the property of the company, in consideration of their protecting these directors from their endorsements. The testimony also shows that the negotiation between Cross, Ludington & Scott, was in pursuance of, and a part of, this unlawful scheme ; and that the proposition of Cross to the company and the resolution of the board of directors accepting the same, were both prepared by the same lawyer at the same time; in other words, the whole negotiation was matter of form a fiction, and a farce. *R. p.* 56, 57. This pretended purchase was May 28, 1859, long after after the decree in the foreclosure suit ; and it must be borne in mind that

at the date of that decree, the $280,000 bonds were not outstanding, at all as against the company.

After pretending to become the absolute owners of said $322,000 bonds, Cross, Ludington & Scott, produced said bonds before the master, and in court, and the final decree in the foreclosure suit, was rendered upon and for said $322,000 bonds, and no others.

The secretary and attorney of the company knew that Cross, Ludington & Scott, pretended before the master and the court, to be absolute owners of all the bonds, and made no objection; R. p. 77.

The secretary and attorney of the company prepared the decree against the company; *R. p.* 75.

The whole proceedings of the foreclosure suit from praecipe to final decree were conducted against the company by the said secretary and attorney of the company; *R. p.* 75.

And the services of the secretary and attorney of the company in obtaining a decree against the company to transfer all its property to Cross, Ludington & Scott, were paid for by the latter parties; *R. p.* 77.

The expenses of the foreclosure were to be borne by the directors. R., p. 55.

These facts are substantially the same as attended the foreclosure of the Barnes mortgage on the La Crosse and Milwaukee railroad, in regard to which this court said:

"It needs no authorities to show that such a sale cannot be upheld without sanctioning the grossest fraud and injustice, to the La Crosse and Milwaukee company the mortgagor and its creditors. This deceptive notice

"was calculated to destroy all competition among the "bidders, and, indeed, to exclude from the purchase "every one except those engaged in the perpetration of "the fraud."

James vs. R.R. 6 *Wall.* 752

And the conduct of these directors is not distinguishable from that which was commented on so severely by this court, in

Koehler vs. Black River Co. 2 *Black* 715.

The directors agreed to, and did, sacrifice the entire property of the company, which it was their duty as trustees to protect, to secure the personal advantage of discharge from their endorsements.

These circumstances combining; a foreclosure suit conducted by collusion; the attorney the secretary and a director of the company commencing the suit, and receiving service of his own subpoena; making default for the company; then drawing the final decree against the company; and receiving his fees for such valuable and *bona fide* services, from the conspirators who were preparing to swallow the entire property of the company, and thus defraud all stockholders and creditors, resulted as might have been expected, in a complete consumation of the meditated fraud.

Cross, Ludington and Scott, pretending to have a decree for $ 379,595 55, which had cost them $ 13,380 20, prevented all competition at the sale, and purchased the entire railroad, locomtives, cars and franchises of the company for $20,000 00.

The value of the property thus acquired by Cross Ludington and Scott; as shown by the proof is as follows;

Iron. 500 tons R. p. 71; Scott says they sold it for $45 per ton, R. p. 68, - -	$ 22.500
Locomotives. Cost company $18,000, had been but little used and worth same, R. p. 71,	18,000
Platform Cars. Ten, worth $500 each, R. p. 71,	5,000
Right of Way. The company had paid out from $15,000 to $20,000, R. p. 64, - - - -	15,000
Chairs. 25,000 at 3 cents, R. p. 79, - - -	750
Spike, R.. p 79 - - - - - - -	750
Ties. R., p. 79, - - - - - - -	3,300
Fence. R., p. 79, - - - - - - -	800
	$66,100.00
Deduct what claim and bonds cost Cross, Ludington & Scott.	13,380.20
Profits to Cross, Ludington & Scott, - -	52,719.80

This estimate does not include the value of the franchises of the company, which are shown to be valuable; though no particular value is stated. R. p. 79.

This is believed to be the only railroad company having franchise to build a railroad through the city of Milwaukee.

II.

The sale to Cross, Ludington & Scott should be declared void; and they should be held liable for the full value of the property which they converted to their own use subsequent to the sale.

Cross testifies that they realized tor the property sold by them subsequent to the foreclosure sale, over $30,000.

R. p. 67. And Scott testifies that the amount was over $30,000 ; one or two thousand dollars over that amount. R. p. 68.

The most favorable decree that these defendants can *ask*, we submit, is that the sale should be set aside ; that they should be decreed to pay the complainants the difference between said $32,000.00

And the amount paid by them for the claim and bonds $13,380 20

$18,619.80

Together with interest on that balance from the day of the sale to the day of the final decree in this suit.

But we submit that they should be charged with the full value of the property they received and converted to their own use, less said $13,380.20.

That is property, - - - - - - - - - - $66,100.00
Less, sum paid, - - - - - - - - - - 13,380.20

$52,719.80

A. A. JACKSON,
MATT H. CARPENTER.
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

United States Supreme Court.

G. P. DRURY, *et al.*,

Appellants,

vs.

THE CITY OF MILWAUKEE, *et al.*,

Respondents.

BRIEF OF THE APPELLEE, THE CITY OF MILWAUKEE.

H. L. PALMER,

of Counsel for the City of Milwaukee.

Supreme Court of the U. S.

G. P. DRURY & WILLIAM PAGE, Assignees of the Boston Locomotive Works,
Appellants,
vs.
THE MILWAUKEE & SUPERIOR RAILROAD COMPANY, THE CITY OF MILWAUKEE, JAMES B. CROSS, JAMES LUDINGTON and SAMUEL B. SCOTT,
Appellees.

Brief and points on behalf of the Appellee the City of Milwaukee.

STATEMENT.

It is charged in the Bill of Complaint, (page 3, of printed record,) that the City of Milwaukee has in its possession a large amount of notes and mortgages given to secure the same, being of various dates and given by different persons to the Railroad Company, being such notes and mortgages as are commonly called "Railroad Farm Mortgages," and amounting in the aggregate to $50,000, which it is further alleged belong to the Milwaukee and Superior Railroad Company, that it is claimed by the City of Milwaukee that said farm mortgages and notes were assigned and transferred by the Railroad Company to said city, and were held by the city as a security or indemnity against loss by reason of the pretended loan by the city to the Railroad Company, of the corporate bonds of the city, amounting in the aggregate to $100,000, to aid in the construction of the

road of said company; and that the loan of its corporate bonds by said city to said Railroad Company was without authority of law, the bonds so issued were void, and that the city had not suffered and could not suffer or sustain any loss or damage by reason thereof. And the relief prayed for as against the City of Milwaukee, is, that it may be adjudged that the transfer and delivery of said notes and mortgages to the City of Milwaukee, was without any good or *bona fide* consideration, and fraudulent and void as against the creditors of the said Railroad Company and the complainants, and that the City of Milwaukee be decreed to assign, transfer and deliver to the receiver prayed for, all of said notes and mortgages received by it from said Railroad Company. (Printed record, page 22, folio 47.)

The answer of the City of Milwaukee puts in issue the recovery of the judgment set forth in the bill, and the assignment thereof to the complainant, and states that the city holds $50,000 of farm mortgages and bonds, or thereabouts, originally given by various persons to the Railroad Company in payment of their subscriptions to the capital stock of said company, and which were transferred to and deposited with the city as security for the undertaking of the company to pay, satisfy and discharge the principal and interest of all the bonds of the city which should be delivered to the Railroad Company. (Page 26, printed record.) That pursuant to law and under an ordinance duly passed, the City of Milwaukee issued and delivered to the Railroad Company the bonds of the city to the amount of $100,000; that the bonds so issued and delivered by the City of Mllwaukee to the Railroad Company, were sold and delivered by the City of Milwaukee to the Railroad Company for a valuable and good consideration, and were then held and owned by various persons who had purchased the same, either directly of the Railroad Company, or at second hand, from those who purchased from the Railroad Company, and who had paid large sums therefor, in good

faith, and in great part relying upon the faith of the securities so held by the city for the ultimate payment of said bonds, principal and interest, by the Railroad Company, and insists that the question of the validity of the city bonds so issued and delivered to the Rail Road Company, cannot be determined in this cause for the reason, that the holders and owners of said city bonds are not parties thereto; that the said farm mortgages and notes are held by the city as a *bona fide* purchaser of the same, before due, for a valuable consideration actually paid therefor, without any notice of any defect therein, or any defence legal or equitable thereto.

The decree, (page 116, printed record,) dismissed the bill as to the several defendants, the City of Milwaukee, James B. Cross, James Ludington and Samuel B. Scott.

The prayer for appeal and the appeal allowed is general and seems to embrace the entire decree—(p. 116, printed record.)

The appeal bond however runs to the defendants, James B. Cross, James Ludington and Samuel B. Scott, only—(printed record, p. 116, 117) and is conditioned for the payment of such costs as may be awarded "*to the said respondents.*"

I.

If this is not an appeal from the entire decree, but only from so much thereof as relates to and affects James B. Cross, James Ludington and Samuel B. Scott, then the City of Milwaukee is not here in court, and has nothing to urge. It is submitted, that notwithstanding the prayer for appeal is general, and does not show whether it was from the entire decree or only a part, it was allowed upon the condition that the appellants should give a bond with sure-

ties, &c., in the penalty of two hundred and fifty dollars for the costs of said appeal, and the bond having been given running to the three defendants, Cross, Ludington and Scott, only, and conditioned to answer such costs as might be decreed and adjudged "*to the said respondents*," viz: Cross, Ludington and Scott, the decree below so far as it relates to the City of Milwaukee, is not appealed from and is not now before this court, and should not be reversed, modified or corrected by the judgment which is to be pronounced here.

But if this court should be of the opinion that the entire decree is brought up by this appeal and is now properly before the court for review, then we say on behalf of the defendant the City of Milwaukee:

II.

That there is no sufficient testimony in the case showing an assignment of the judgments described in the bill of complaint by the Boston Locomotive Works, the plaintiffs therein, to the complainants. It is submitted that the title of the complainants to said judgments is fairly put in issue by the first paragraph of the answer of the defendant the City of Milwaukee, (page 26, printed case,) and the complainants having failed to establish their title by proper evidence their bill was properly dismissed.

III.

The record fails to disclose any evidence tending to impeach the validity of the Municipal Bonds issued and delivered by the City of Milwaukee to the Milwaukee and Superior Rail Road Company, or the title of the city to the notes and farm mortgages transferred by the Rail Road

Company to, and held by the said city as a security and indemnity for, the ultimate payment of the bonds of the city issued to the Rail Road Company, both principal and interest.

The bonds of the City of Milwaukee to the amount in the aggregate of $100,000, were issued and delivered to the said Rail Road Company, pursuant to the authority conferred upon the city, by chapter 244 of the laws of Wisconsin of 1853, as amended by chapter 380, of the laws of 1853, chapter 265, of the laws of 1854, and chapter 164, of the laws of 1856, and in pursuance of the ordinances set forth in the answer of the city, (page 27 and 29 of the printed record,) and this court will not assume, in the absence of testimony tending to establish the charge, that such bonds were issued without authority of law and were void, and that therefore the said notes and farm mortgages were transferred to the city without consideration and in fraud of the rights of the creditors of the Rail Road Company.

IV.

The question of the validity of the bonds issued by the city, cannot be determined in this suit, because the owners of them are not before the court, and would not be bound by the decree. The city therefore, should not be required to deliver up the securities held by it, until the holders of its bonds are made parties to a suit instituted for that purpose, and so subjected to the jurisdiction of the court, that it may compel a surrender of the bonds.

Burhop vs. the city of Milwaukee *et al.*, 18 Wis. 431.

Same vs. Same, 20 Wis., 338.

Same vs. Same, 21 Wis., 257.

The decree of the court below so far as relates to the defendant, the City of Milwaukee, ought therefore to be affirmed.

H. L. PALMER,

Counsel for the Defendant, the City of Milwaukee.

United States Supreme Court.

G. P. DRURY AND WILLIAM PAGE, Assignees of the Boston Locomotive Works,

Appellants,

vs.

JAMES B. CROSS, JAMES LUDINGTON, SAMUEL B. SCOTT and others,

Respondents.

Respondents' Brief and Points.

Supreme Court of the U. S.

G. P. DRURY AND WILLIAM PAGE,
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JAMES B. CROSS, JAMES LUDINGTON, SAMUEL B. SCOTT and others,
Respondents.

It may prove convenient to the Court to have a statement of the facts of the case in a connected form.

In December 1856, Messrs. Bailey Bros. & Co., through their agents C. B. Raymond & Co., made a contract for the sale of 4,000 tons of iron rails to the Milwaukee and Superior Railroad Company, to be delivered during 1857, receiving in payment the notes of the Company, endorsed by some of the directors; and as collateral security to the notes, the first mortgage bonds of the Company at 50 cents on the dollar. (See contract, record p. 85, Schedule F.) The building of the road had then just commenced, and in September, 1857, they had about five miles of road completed, when, owing to the financial revulsion, they were compelled to suspend work. An arrangement was then entered into, whereby the sellers received back all the iron delivered save that which had been laid down, and took new notes for the balance due—some $21,000, endorsed by the same directors, and retaining as collateral security $42,000 of the mortgage bonds. It was also at the

time agreed that the Company would not issue and put in circulation more than $270,000 of bonds until the payment of Raymond & Co., who acted for Bailey & Co.; and that $280,000, balance of $550,000 which it had been theretofore resolved to issue, should be lodged with M. K. Jessup & Co., agents of the railroad company; to remain with them until Raymond & Co. were paid, and until a certain portion of the road was completed. (See resolution, Schedule A, p. 79.) After this, J. Boorman Johnston & Co. became the agents of Bailey Bros. & Co., and they had transferred to them the notes of the Company and the 42 bonds from Raymond & Co. These notes all matured, when the Company and the endorsers were sued in the name of Johnston & Co. in the District Court of the U. S. for Wisconsin, and judgments recovered amounting in the aggregate to about $23,000. The endorsers at this time were believed to be insolvent, and the idea of building the railroad had been substantially abandoned. The endorsers having mean time become insolvent, there was no way left open to collect the judgments other than by foreclosure of the mortgage. Authority was obtained from the trustee for that purpose and proceedings commenced and final decree obtained. Pending the proceedings and on the 3d of March, 1859, the Company partially rescinded the resolution under which the 280 bonds were placed in the hands of Jessup & Co., and so far as to allow them to be transferred to Johnston & Co. as additional collateral security to the judgments. At this time there was $100,000 of the bonds held by Levi Blossom, and $128,000 by the City of Milwaukee. The Company then by resolution authorized the delivery of the 280 bonds by Jessup & Co. to Johnston & Co. (Schedule B, p. 80.) Afterwards and on the 21st of April following, the Company by resolution authorized Johnston & Co. to assign the bonds in their hands with any assignment they might make of the judgments; (Schedule C, p. 81;) and in May, Johnston & Co. assigned

to Cross, in trust for himself, Ludington & Scott, the judgments and all the bonds as collateral. (Schedule E, p. 82.) Shortly afterwards, Cross proposed to the Company to become the purchaser absolutely of the bonds; whereupon the Company authorized Cross, to offer the bonds at public sale, and to bid at the sale. (Schedule D, p. 81.) The bonds were accordingly sold, and Cross became the purchaser.

The road went to sale under the decree in August, 1859, after three months advertisment in New York and Milwaukee, and Cross became the purchaser, for the sum of twenty thousand one hundred dollars, and paid the money into Court, to await distribution. He subsequently became the owner of the 100 Blossom bonds. Upon the coming in of the Master's report, to whom it had been referred, to ascertain who were holders of bonds, and whether held absolutely or as collateral security from the Company, it appeared the City of Milwaukee held its bonds from the Company, as indemnity; and, as the Court held that no liability on its part had or could attach, the City did not share in the proceeds of sale; hence, the entire proceeds amounting to $18,000, after deducting costs and expenses were paid to Cross.

It appears that in 1857, the "Bostom Locomotive Works"—a company of which the appellants claim to be assignees—sold to the railroad company two locomotives; receiving in payment the notes of the company secured by a pledge of mortgages of real estate given to the company upon stock subscriptions by individuals resident along the contempleted line of the road. This company alleged that they were deceived by the representations of Alton, the president of the railroad company, as to the value of these mortgages, and some time in 1858, sought to rescind the contract of sale of the locomotives, and commenced a suit in the State Court, against the railroad company, praying that the contract of sale might be declared void for fraud, and that the railroad company might be decreed to

time agreed that the Company would not issue and put in circulation more than $270,000 of bonds until the payment of Raymond & Co., who acted for Bailey & Co.; and that $280,000, balance of $550,000 which it had been theretofore resolved to issue, should be lodged with M.K. Jessup & Co., agents of the railroad company; to remain with them until Raymond & Co. were paid, and until a certain portion of the road was completed. (See resolution, Schedule A, p. 79.) After this, J. Boorman Johnston & Co. became the agents of Bailey Bros. & Co., and they had transferred to them the notes of the Company and the 42 bonds from Raymond & Co. These notes all matured, when the Company and the endorsers were sued in the name of Johnston & Co. in the District Court of the U. S. for Wisconsin, and judgments recovered amounting in the aggregate to about $23,000. The endorsers at this time were believed to be insolvent, and the idea of building the railroad had been substantially abandoned. The endorsers having mean time become insolvent, there was no way left open to collect the judgments other than by foreclosure of the mortgage. Authority was obtained from the trustee for that purpose and proceedings commenced and final decree obtained. Pending the proceedings and on the 3d of March, 1859, the Company partially rescinded the resolution under which the 280 bonds were placed in the hands of Jessup & Co., and so far as to allow them to be transferred to Johnston & Co. as additional collateral security to the judgments. At this time there was $100,000 of the bonds held by Levi Blossom, and $128,000 by the City of Milwaukee. The Company then by resolution authorized the delivery of the 280 bonds by Jessup & Co. to Johnston & Co. (Schedule B, p. 80.) Afterwards and on the 21st of April following, the Company by resolution authorized Johnston & Co. to assign the bonds in their hands with any assignment they might make of the judgments; (Schedule C, p. 81;) and in May, Johnston & Co. assigned

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time agreed that the Company would not issue and put in circulation more than $270,000 of bonds until the payment of Raymond & Co., who acted for Bailey & Co.; and that $280,000, balance of $550,000 which it had been theretofore resolved to issue, should be lodged with M.K. Jessup & Co., agents of the railroad company; to remain with them until Raymond & Co. were paid, and until a certain portion of the road was completed. (See resolution, Schedule A, p. 79.) After this, J. Boorman Johnston & Co. became the agents of Bailey Bros. & Co., and they had transferred to them the notes of the Company and the 42 bonds from Raymond & Co. These notes all matured, when the Company and the endorsers were sued in the name of Johnston & Co. in the District Court of the U. S. for Wisconsin, and judgments recovered amounting in the aggregate to about $23,000. The endorsers at this time were believed to be insolvent, and the idea of building the railroad had been substantially abandoned. The endorsers having mean time become insolvent, there was no way left open to collect the judgments other than by foreclosure of the mortgage. Authority was obtained from the trustee for that purpose and proceedings commenced and final decree obtained. Pending the proceedings and on the 3d of March, 1859, the Company partially rescinded the resolution under which the 280 bonds were placed in the hands of Jessup & Co., and so far as to allow them to be transferred to Johnston & Co. as additional collateral security to the judgments. At this time there was $100,000 of the bonds held by Levi Blossom, and $128,000 by the City of Milwaukee. The Company then by resolution authorized the delivery of the 280 bonds by Jessup & Co. to Johnston & Co. (Schedule B, p. 80.) Afterwards and on the 21st of April following, the Company by resolution authorized Johnston & Co. to assign the bonds in their hands with any assignment they might make of the judgments; (Schedule C, p. 81;) and in May, Johnston & Co. assigned

to Cross, in trust for himself, Ludington & Scott, the judgments and all the bonds as collateral. (Schedule E, p. 82.) Shortly afterwards, Cross proposed to the Company to become the purchaser absolutely of the bonds; whereupon the Company authorized Cross, to offer the bonds at public sale, and to bid at the sale. (Schedule D, p. 81.) The bonds were accordingly sold, and Cross became the purchaser.

The road went to sale under the decree in August, 1859, after three months advertisment in New York and Milwaukee, and Cross became the purchaser, for the sum of twenty thousand one hundred dollars, and paid the money into Court, to await distribution. He subsequently became the owner of the 100 Blossom bonds. Upon the coming in of the Master's report, to whom it had been referred, to ascertain who were holders of bonds, and whether held absolutely or as collateral security from the Company, it appeared the City of Milwaukee held its bonds from the Company, as indemnity; and, as the Court held that no liability on its part had or could attach, the City did not share in the proceeds of sale; hence, the entire proceeds amounting to $18,000, after deducting costs and expenses were paid to Cross.

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surrender the locomotives. This suit was pending at the time the foreclosure proceedings were commenced, and until some time after the sale under the decree of foreclosure. The case was afterwards abandoned, and the appellants obtained in some manner, by confession, a judgment against the railroad company, after the road with all its privileges, immunities and franchises, had passed away by sale under the mortgage. This judgment is the foundation of the present bill.

Mr. Haertel, a director in the railroad company, and one of the endorsers of the Raymond & Co. notes, urged the foreclosure of the mortgage, in order that the Johnston & Co. judgments might be realized out of the company, rather than that they be held over the endorsers. He also, probably, solicited Cross and others to purchase the judgments and securities, in the belief that in their hands there would be greater likelihood of the property on sale, producing enough to satisfy the judgments against the endorsers.

(The foregoing facts all appear in the record save that of the pendency of the suit in the State Court—the object of which was to rescind the contract of sale of the two locomotives. That appears in the return to the certiorari issued to correct the original record.

It will be observed from the record that a demurrer was originally interposed to the bill of complaint. We could not then, nor do we now perceive upon what legal theory the complaints proceed.

We had not the benefit in the Court below of any suggestion why the bill should be maintained; hence, we must proceed by anticipation.

1.

The bill alleges no fact or circumstance impeaching the decree in the foreclosure suit, and contains no prayer to vacate or reform it. It is not alleged that the proceedings in the foreclosure suit were irregular, or, that the court had

not jurisdiction of the case and full authority to make the decree. The record in that case put in evidence on behalf of the defendants, it is respectfully submitted, shows that the proceedings therein were regular throughout; that the proper decree was made and a regular sale and confirmation followed, by which the defendants Cross, Ludington & Scott, acquired a good title to the property covered by the mortgage.

The fact that the Trustee in the mortgage, the Farmers Loan & Trust Company, did not inaugurate the foreclosure suit of their own motion, but consented that the suit might be commenced and prosecuted in the name of the trustee, on the request, at the expense and for the benefit of J. Boorman, Johnston & Co., affords no tenable ground of objection to the foreclosure proceedings: Johnston & Co. were holders of bonds secured by the mortgage. Default had been made in the payment of interest on their bonds, and they had the right to insist upon a foreclosure. They might have even commenced a suit for that purpose without the consent of the Trustee; or, in case of the neglect or refusal of the Trustee, on reasonable request, to take possession of the mortgaged premises, and proceed to execute the trust by foreclosing the mortgage, a Court of Equity on their application would have removed the Trustee. The Farmers Loan & Trust Company, was a mere naked Trustee without interest, and Johnston & Co. were beneficiaries of the trust, and a Court of Equity would not under such circumstances allow the Trustee, by non action, to defeat the object of the trust or to embarrass the *cestuis que trust* in their efforts to render the trust effectual.

Willards Equity, 470.

2 Storeys Equity, Jur., § 1287. Id. § 1061.

Depeyster vs Clendening, 8 Paige 310.

Lewin on Trusts, 598.

In the matter of the Mechanics Bank, 2 Barber S. C. R. 446.

The transactions between the railroad company and J. Boorman Johnston & Co., were for the simple tendency and lawful object of security of a just debt. They did indeed give to these creditors a preference in the manner described, in the depositions of Emmons (p 53), Haertel (p 63), Stark (p 69), Knox (p 94), and Jessup (p 96).

That such a preference was lawful has been repeatedly determined by this Court.

Marbury vs. Brooks, 7 Wheat, 556.
Brooks vs. Marbury, 11 Wheat 78.
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In the latter case the court per Thompson, justice, say: "That a debtor has a legal right to prefer one or more of his creditors over others, when the transaction is *bona fide*, is not an open question in this court. That point was settled in Marbury vs. Brooks which came twice before the court under circumstances somewhat different and is repeated in 7 Wheat, 556 and in 11 Wheat, 78" (p 118,) and also that "If the principle be sound, that a debtor may lawfully apply his property to the payment of such creditors as he may choose to prefer, he may certainly elect the time when it is to be done, so as to make it effectual." (p. 116)

By making the transfer of the 280 *Bonds* which had been deposited with M. K. Jessup & Co., to Johnson & Co. the Directors of the railroad company only exercised their undoubted right to give a preference to a meritorious creditors. Neither the complainants nor their assignor had acquired any lien, legal or equitable, upon the property of the railroad company or upon the bonds deposited with M. K. Jessup & Co. The Boston Locomotive Works, chose, when they made their contract with the railroad company, to stipulate for other security; they re-

quired the notes given to them to be endorsed by one director, (Alton,) and also a deposit with them of farm mortgages at 75 cents on the dollar, amounting to $24,000 accompanied by eight per cent. bonds of the company, (not secured however, by the mortgage on the road) as collateral security for the payment of the notes. These securities were delivered to the Boston Locomotive Works; (See contract p. 113, 114 of record and testimony of Holmes Hinckley p. 112 of record, also the judgment record in The Boston Locomotive Works vs. The Milwaukee & Superior Railroad Company embraced in the return to the certiorari.) The notes are merged in the judgment, but the $24,000 of farm mortgages and the 8 per cent. bonds annexed to them, are now held by the complainants or have been disposed of or collected by them or their assignor, and for aught that appears in this case their debt may have been realized pending this litigation.

The complainants relied upon the securities for which they stipulated, and had no claim down to the date of their judgment upon any other property of the company. They did not rely upon the mortgage bonds, did not stipulate for and did not have any of them; they had no claim upon or interest in the Jessup bonds, and therefore have no right to question the disposition made of them by the company.

II.

The debt of the railroad company to Johnston & Co. is not impeached or attempted to be impeached. There is no allegation made in the bill against its validity. It was the actual consideration agreed to be paid for the iron rails laid down upon the road, and if any claim against the company merited protection that did.

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II.

The debt of the railroad company to Johnston & Co. is not impeached or attempted to be impeached. There is no allegation made in the bill against its validity. It was the actual consideration agreed to be paid for the iron rails laid down upon the road, and if any claim against the company merited protection that did.

But it is alleged that the delivery of the bonds, which had been deposited with M. K. Jessup & Co., to J. Boorman Johnston & Co., was fraudulent and void as against the creditors of the company and particularly as against the complainants.

1st. Because it is said the transfer was made voluntarily, gratuitously and without consideration.

A. These bonds were not property in the hands of the company. They were the obligations of the company and of no effect whatever until delivered; and while they remained in the hands of M. K. Jessup & Co., they remained the obligations of the company unnegotiated and inoperative. On a foreclosure of the mortgage by which they were secured, they would not in the hands of Jessup & Co., have been entitled to share in the proceeds of the sale; but the whole of such proceeds would have belonged to, and would have been divided among the holders of the remaining bonds which had actually been disposed of and put in circulation by the company.

B. These 280 bonds were deposited with Jessup & Company for the very purpose of increasing and rendering more effectual the security of Johnston & Co. They were not to be issued until Johnston & Co. were paid, and twenty-seven miles of the road were completed. (See resolution of the company, folios 193, 194, 195, on p. 79 and 80 of record.) It was no violation of the trust upon which these bonds were so deposited with Jessup & Co. to transfer them to Johnston & Co. They were deposited to increase the security for the iron debt, and the transfer of them to Johnston & Co., if it accomplished any purpose, did precisely that.

C. It cannot be said that the transfer was without consideration. The existing debt from the railroad company to Johnston & Co., was a sufficient and a valid consideration for the transfer. It was so held in the cases of Brooks . Marbury and Marbury vs. Brooks cited above.

D. It may have been a voluntary transfer, but it was not therefore, either fraudulent or void. It was a just and equitable proceeding. It was legitimate for the Directors of the railroad company to make the transfer in order to ensure the payment of a debt so meritorious as the claim of Johnston & Co., against the railroad company was.

2. Because a part of the Directors of the railroad company who directed the deposit of the 280 bonds with Jessup & Co., and who afterwards directed the transfer of them to Johnston & Co., were endorsers on the notes held by Johnston & Co.

A. It is not seen how the fact that a part of the Directors were personally liable on the Johnston notes, changes the character of the transaction, or affords any evidence of fraud.

The Directors so liable, were sureties on the Johnston debt. If they had paid it voluntarily, or if payment had been coerced from them, they would have had a meritorious claim against the railroad company, for the amount paid by them, and would have been entitled to be placed in the position and subrogated to the rights and privileges and securities of Johnston & Co.

3. Because the transfer of the bonds to Johnston & Co., increased the volume of securities protected by the mortgage upon which they or their assignee would be entitled to a distributive share of the proceeds of the sale of the mortgaged premises, to the detriment of the interests of general creditors.

A. The total number of bonds executed under the mortgage was 550, amounting to $550,000; of these 100 had been duly cancelled as the bill alleges; (folio 12, p. 5.) 128 had been pledged to the City of Milwaukee as an indemnity for the $100,000 of the bonds of the city delivered to

and used by the railroad company; 42 had been pledged to Bailey Brothers & Co., as collateral to the iron debt, and the remaining 280 were held as has been shown, by M. K. Jessup & Co. The mortgaged premises realized on the sale $20,100.

The Court held that the bonds pledged to the City of Milwaukee were not entitled to share in the proceeds of the sale; the 100 cancelled bonds certainly were not. And if the 280 had been allowed to remain in the hands of Jessup & Co., upon the terms upon which they were placed there, (and no disposition could have been made of them without the consent of Johnston & Co.) there would still have remained the 42 bonds originally pledged to Johnston & Co., about which no question is raised, and these would have been at the date of the sale, the only bonds entitled to share in the proceeds of the sale, and would have absorbed the entire proceeds. The transfer of the additional 280 did not accomplish any thing more.

III.

The purchase by Cross, Ludington & Scott of the judgment and accompanying securities held by Johnston & Co., against the railroad company, was a legitimate transaction. The judgment was a subject of sale. The purchasers acquired the rights of their vendor. The amount of the indebtedness was not increased by the change of ownership of the judgment, and it is not perceived how the complainants or other creditors of the company were in any degree injured by it. If the judgments and securities had remained in the hands of Johnston & Co., they must still have been paid, out of the proceeds of the sale of the mortgaged property. It could make no difference to the complainants whether the proceeds of the sale were paid to Cross, Ludington & Scott, or to Johnston & Co.

IV.

The sale of the bonds by Cross at auction was no fraud upon the complainants and they were uninjured by it.

1. The bonds were held by Cross as collateral security for the principal debt, i. e. the judgments which Johnston & Co. had recovered against the railroad company. The bonds constituted a pledge, a sale of which might have been enforced by legal proceedings, anterior to the foreclosure, if the railroad company had been unwilling to consent to a sale. No one save the railroad company and its creditors holding the pledge, had any interest in the terms of the pledge.

The company might have conferred upon Johnston & Co. and their assigns, in the first instance, the authority to sell the pledged securities at public or private sale, with or without notice; and did in fact authorize a sale of the 42 bonds originally pledged "at auction or otherwise, without notice to said railroad company," (see the contract, p. 107 of record,) as they authorized the Boston Locomotive Works to sell the farm mortgages pledged to that company, (see record page 113, 114,) without interfering with the rights of, or committing any fraud upon other creditors; and they might lawfully consent to a sale of the pledged securities afterwards, upon such terms as they deemed advisible, without infringing any principle of law or equity; unless in the meantime other creditors had secured an equitable lien upon the securities so held in pledge.

2. The railroad company was clothed with ample power by its charter to issue its bonds secured by a mortgage and to dispose of them in the manner in which the bonds in question were disposed of. In section 23 of the act incorporating the Milwaukee and Superior Railroad Company

it is provided that, "The said railroad company is hereby fully authorized and empowered by its agents or brokers, or otherwise, either in or out of this State, to sell, loan, pledge, hypothicate or otherwise dispose of, any or all of the said bonds, hereby authorized to be issued, at par or at any price less than par and for such sum or sums and on such terms as (*to*) the said company or its agents or brokers shall appear most for the interests of the said company; and its directors, officers and agents are hereby authorized and empowered to have, exercise, and enjoy all the rights, privileges, and powers hereby conferred upon them respectively, any law of this or any other State to the contrary notwithstanding."

Private Laws of Wisconsin 1856, Chapter 79, Sec. 23, p. 139.

V.

It is alleged that the 280 bonds which were deposited with M. K. Jessup & Co., were never issued or disposed of by the company, and that the company was expressly prohibited from making disposition of them by its contract, under which they were deposited. (folio 25, p. 11 of record.)

1. It has already been shown that the transfer of these bonds to Johnston & Co., was not in violation of the terms of the deposit. But suppose they had never been issued. Cross, Ludington & Scott, still held 42 bonds amounting to $42,000, besides the accrued interest, which no attempt was made to impeach, and which if the 280 Jessup Bonds were not entitled to participate in the benefits of the mortgage, would have been the only bonds outstanding at the time of the foreclosure sale, entitled to participate in the proceeds of the sale, and those amounted to more than double the sum realized on the sale, and would have absorbed the entire proceeds.

2. Again, assuming that the transfer of the bonds, held by M. K. Jessup & Co. to J. Boorman Johnston & Co., was void, and that the sale of those, and also of the 42 bonds originally pledged to them, was void, and the bonds lawfully pledged had remained as collateral security down to the sale, the complainants would have been in no better plight, for then Cross, Ludington & Scott, would have been entitled to receive out of the proceeds of the sale, the amount then due for principal and interest on the judgments which Johnston & Co. had recovered against the Railroad Company, and assigned to them, and that amount was in excess of the amount realized on the sale. These judgments were as follows:

January 22, 1859	Damages	$6,545	18
	Costs	33	21
April 26, 1859	Damages	5,673	93
	Costs	20	82
April 26, 1859	Damages	1,157	52
	Costs	20	76
April 26, 1859	Damages	8,239	72
	Costs	15	00
Total		$21,706	14

And the following judgments on the same paper vs Endorsers, viz:

December 6, 1858, vs Alton	Damages	$5,712	44	
	Costs	33	50	$33 50
January 22, 1859, vs Hull	Damages	5,712	44	
	Costs	46	45	46 45
January 22, 1859, vs Haertel	Damages	5,712	44	
	Costs	46	50	46 50
January 22, 1859, vs Button	Damages	5,759	38	
	Costs	46	40	46 40
Jan. 22, 1859, vs Hull, Alton, Haertel & Button,	Damages	1,154	86	
	Costs	40	79	40 79
Jan. 22, 1859, vs Hull, Alton, Haertel & Button,	Damages	1,174	76	
	Costs	56	58	56 58
April 26, 1859, vs Hull, Alton, Haertel & Button,	Damages	5,673	93	
	Costs	52	16	52 16
April 26, 1859, vs Haertel, Hull, Alton & Button,	Damages	1,157	52	
	Costs	27	54	27 54
April 26, 1859, vs Hull, Haertel, Alton & Button,	Damages	6,736	83	
	Costs	50	88	50 88

Aggregate besides accrued interest $22,106 94

Record pages ..... 82 & 83.

VI.

The title of the complainants to the judgment described in the bill of complainants is put in issue by the answer of Cross, Ludington & Scott, and it is submitted that the record does not exhibit any sufficient evidence of an assignment of the judgment by the Boston Locomotive Works to them, and the complainants having failed to establish their title by proper evidence, their bill was properly dismissed.

The decree of the court below dismissing the bill ought to be affirmed.

H. L. PALMER,
Counsel for the Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 2.

G. P. DRURY AND W. PAGE, ASSIGNEES OF THE BOSTON LOCOMOTIVE WORKS, APPELLANTS,

VS.

THE MILWAUKEE AND SUPERIOR RAILROAD COMPANY, JAMES B. CROSS, JAMES LUDDINGTON AND SAMUEL B. SCOTT.

RETURN TO WRIT OF CERTIORARI.

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1 District Court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a special term of the District Court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the first day) of October, A. D. 1860, present the Honorable Andrew G. Miller, judge of said court, presiding, Jehu H. Lewis, marshal, John M. Miller, clerk, among other the following proceedings were had, to wit:

BOSTON LOCOMOTIVE WORKS, plaintiff,
vs.
MILWAUKEE AND SUPERIOR RAILROAD COMpany, defendant. } At law.

Be it remembered that heretofore, to wit, on the 31st day of August, A. D. 1860, came the above-named plaintiff, by his attorneys, Messrs. Knowlton, Prichard & Jackson, and filed their præcipe for a summons against the above-named defendant, as follows, to wit:

U. S. Dis'ct Court, district of Wisconsin.

Præcipe for summons.

BOSTON LOCOMOTIVE WORKS, plaintiff,
ag'st
MILWAUKEE AND SUPERIOR RAILROAD COMpany, defendant.

To the clerk of the U. S. Dis'ct Court for dis'ct of Wisconsin:

Please issue summons in above-entitled action. Damages, $30,000 00.

Yours, &c.,

KNOWLTON, PRICHARD & JACKSON.
Plaintiff's Attorneys, Janesville, Wis.

Whereupon a summons issued as follows:

2 THE UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon Milwaukee and Superior Railroad Company to appear before the District Court of the United States of America for the district of Wisconsin aforesaid, at Milwaukee, on the first Monday of September ensuing, then and there to answer unto Boston Locomotive Works in a plea of trespass on the case on promises to its damage thirty thousand dollars, which shall then and there be made to appear; and of this writ make due return.

Witness the Hon. Andrew G. Miller, judge of the said District Court of the United States, at the city of Milwaukee, in the said district of Wisconsin, this thirty-first day of August, in the year of our Lord one thonsand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

[SEAL.] J. M. MILLER, *Clerk.*

KNOWLTON, PRICHARD & JACKSON,
Attorneys.

Return to summons.

Summons returned: "Served on the within-named Milwaukee and Superior Railroad Company by showing this summons, and leaving a copy thereof with J. Stark, president of said company, this 31st day of August, 1860.

"JEHU H. LEWIS, *Marshal.*"

Fees, $2 32.

Declaration.

SEPTEMBER 3, 1860.

This day came the plaintiff, by its attorneys, and filed its declaration as follows, to wit:

DISTRICT OF WISCONSIN, *ss.*

3 In the District Court of the United States of America for the district of Wisconsin, of the first Monday of September, A. D. 1860.

The Boston Locomotive Works, a corporation duly incorporated in pursuance with an act of the legislature of the Commonwealth of Massachusetts, entitled "An act to incorporate the Boston Locomotive Works," approved March 13th, A. D. 1848, and being a resident of, and doing business in, the said Commonwealth of Massachusetts, and the stock holders thereof being residents of said Commonwealth of Massachusetts, plaintiff, complain of the Milwaukee and Superior Railroad Company, a corporation duly incorporated in pursuance with the provisions of an act of the legislature of the State of Wisconsin, entitled "An act to incorporate the Milwaukee and Superior Railroad Company," approved March 4th, A. D. 1856, and the acts of said legislature amendatory thereto, and being a resident of, and doing business in, the said State of Wisconsin, defendant in this suit, of a plea of trespass upon the case upon promises. For that whereas the said defendant heretofore, to wit, on the first day of August, A. D. 1860, at Milwaukee, in said district, was indebted to the said plaintiff in the sum of thirty thousand dollars for divers goods, wares, and merchandize before that time sold and delivered by the said plaintiff to the said defendant, and at the special instance and request of the said defendant; and being so indebted, and in consideration thereof, the said defendant afterwards, to wit, on the day and year aforesaid, at the place aforesaid,

undertook, and then and there faithfully promised the said plaintiff well and truly to pay them the said sum of money above mentioned, when the said defendant should be thereunto afterwards requested.

And for that whereas also afterwards, to wit, on the same day and year, and at the place aforesaid, the said defendant was indebted to the said plaintiff in the further sum of thirty thousand dollars for the work and labor, care and diligence of the said plaintiff before that time done, performed, and bestowed by the said plaintiff in and about the business of the said defendant, and at the like special instance and request of the said defendant, and also for divers materials and other necessary things by the said plaintiff before that time found, furnished, provided, used and applied in and about that business, work and labor for the said defendant, at the like special instance and request of the said defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay the said sum of money last above mentioned whenever the said defendant should be thereunto afterwards requested.

And for that whereas also afterwards, to wit, on the same day and year, and at the place aforesaid, the said defendant was indebted to the said plaintiff in the further sum of thirty thousand dollars for so much money by the said plaintiff before that time lent and advanced to the said defendant, at its like special instance and request; and being so indebted, and in consideration thereof, it, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay the said plaintiff the said sum of money last above mentioned whenever the said defendant should be thereunto afterwards requested.

And for that whereas also afterwards, to wit, on the same day and year, and at the place aforesaid, the said defendant was indebted to the said plaintiff in the further sum of thirty thousand dollars for so much money by the said plaintiff before that time paid, laid out, and expended to and for the use of the said defendant, at its like special instance and request; and being so indebted, and in consideration thereof, it, the said defendant, undertook, and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff the sum of money last above mentioned whenever the said defendant should be thereunto afterwards requested.

And for that whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of thirty thousand dollars for so much money by the said defendant before that time had and received, to and for the use of the said plaintiff; and being so indebted, and in consideration thereof, it, the said defendant, undertook, and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff the said sum of money last above mentioned whenever the said defendant should be thereunto afterwards requested.

And for that whereas also afterwards, to wit, on the same day

and year, and at the place aforesaid, the said defendant was indebted to the said plaintiff in the further sum of thirty thousand dollars for so much money before that time, and then and there due and payable from the said defendant to the said plaintiff for interest upon, and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said plaintiff, and by the said plaintiff forborne to the said defendant for divers long spaces of time before then elapsed, at the like special instance and request of the said defendant; and being so indebted, and in consideration thereof, the said defendant undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money whenever the said defendant should be thereunto afterwards requested.

And for that whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff before that time due and owing, and then in arrear and unpaid; and upon such accounting the said defendant then and there found to be in arrear and indebted to the said plaintiff in the further sum of thirty thousand dollars; and being so found in arrear and indebted, it, the said defendant, undertook, and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff the said sum of money above specified whenever it, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.) had not as yet paid the several sums of money, or any or either of them, to the said plaintiff; but the said defendant to pay the same or any part thereof to the said plaintiff has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiff of thirty thousand dollars, and therefore they bring suit, &c.

KNOWLTON, PRICHARD & JACKSON,
Pl'ff's Att'ys, Janesville, Wis.

4 To the Milwaukee and Superior Railroad Company, defendants:

You will please take notice that the following are copies of notes which will be produced and given in evidence under the money and common courts, in the foregoing declaration on the trial of this action, to wit:

"$1,815 00. NEW YORK, *July 16th*, 1857.

"Twelve months after date the Milwaukee and Superior Railroad Company, by their president, C. K. Alton, duly authorized, promise to pay to the order of said presiden forty-eight hundred and fifteen dollars, at the office of M. K. Jessup & Co., No. 44 Exchange Place, New York, for value received.

(Signed) "MILWAUKEE AND SUPERIOR RAILROAD COMPANY,
"By C. R. ALTON, *President.*"

On the back of which is endorsed, "C. R. Alton, President."

"$4,736 25. NEW YORK, *July* 16*th*, 1857.

"Nine months after date the Milwaukee and Superior Railroad Company, by their president, C. R. Alton, duly authorized, promise to pay to the order of said president forty-seven hundred and thirty-six and 25-100 dollars, at the office of M. K. Jessup & Co., No. 44 Exchange Place, New York, value received.

(Signed) "MILWAUKEE AND SUPERIOR RAILROAD COMPANY,
"By C. R. ALTON, *President.*"

On the back of which is endorsed, "C. R. Alton, president."

"$4,562 44. MILWAUKEE, *Sept.* 8*th*, 1857.

"Nine months after date the Milwaukee and Superior Railroad Company, by their president, C. R. Alton, duly authorised, hereby promise to pay to the order of said president four thousand five hundred and sixty-two and 44-100 dollars, at the office of M. K. Jessup & Co., No 44 Exchange Place, New York, for value received.

(Signed) "MILWAUKEE AND SUPERIOR RAILROAD CO.,
"By C. R. ALTON, *President.*"

On the back of which is endorsed, "C. R. Alton, president."

5 "$4,562 44. MILWAUKEE, *Sept.* 8*th*, 1857.

"Twelve months after date the Milwaukee and Superior Railroad Company, by their president, C. R. Alton, duly authorized, hereby promise to pay to the order of said president four thousand five hundred and sixty-two and 44-100 dollars, at the office of M. K. Jessup & Co., No. 44 Exchange Place, New York, for value received.

(Signed)
"MILWAUKEE & SUPERIOR RAILROAD COMPANY,
"By C. R. ALTON, *President.*"

On the back of which is endorsed, "C. R. Alton, president."

And on the same day of filing said declaration, to wit, September 3rd, 1860, being a rule day, the said plaintiff by its attorneys entered in the order and rule book a rule to plead, as follows, to wit:

Rule to plead.—Of the first Monday of September, A. D. 1860.

BOSTON LOCOMOTIVE WORKS
vs.
MILWAUKEE & SUPERIOR RAILROAD COMPANY.

"On motion of Knowlton, Prichard and Jackson, plaintiff's attorneys, ordered that the defendant plead to the plaintiff's declaration

on file by the first Monday of October next, or its default will be entered.

"KNOWLTON, PRICHARD & JACKSON,
"*Plaintiff's Attorneys.*"

6 And now, at this same term, to wit, October term, A. D. 1860, and on the second day thereof, to wit, on the second day of October, A. D. 1860, the following proceedings were had, to wit:

Default.

BOSTON LOCOMOTIVE WORKS
vs.
MILWAUKEE & SUPERIOR RAILROAD COMPANY. } At law.

This day came the plaintiff by its counsel, and on its motion it is ordered by the court that the default of the defendant be and is hereby entered for its not appearing and pleading to the plaintiff's declaration herein filed, and that it be referred to the clerk to ascertain and report what sum the plaintiff ought to recover for its damages. The clerk reported in writing that he assessed the damages to the said plaintiff at the sum of twenty-one thousand six hundred and thirty-four dollars and forty-five cents, as follows, to wit:

7 District Court of the United States of America for the district of Wisconsin.

BOSTON LOCOMOTIVE WORKS
vs.
MILWAUKEE & SUPERIOR RAILROAD COMPANY. } No. 51, June term, 1861.

I, John M. Miller, clerk of the District Court of the United States of America for the district of Wisconsin, do hereby report that in pursuance of an order of this court referring to me to ascertain and report the amount due the plaintiff, I have assessed the damages to the plaintiff at the sum of twenty-one thousand six hundred and thirty-four dollars and forty five cents.

Damages, $21,634 45-100.

Dated October 2d, 1860.

J. M. MILLER, *Clerk.*

Judgment.

Whereupon it is considered and adjudged by this court now here, that the said plaintiff do have and recover of the said defendant, Milwaukee and Superior Railroal Company, the said sum of twenty-one thousand six hundred and thirty-four dollars and forty-five cents, with twenty-one dollars and twelve cents, its costs about its said suit in this behalf by it expended, and that it have execution therefor.

Judgment roll signed October 2nd, A. D. 1860.

J. M. MILLER, *Clerk.*

Damages	$21,634 45
Costs	21 12
	$21,655 57

Judgment roll filed October 2d, A. D. 1860, at 5 o'clock p. m.
J. M. MILLER, *Clerk.*

8 DECEMBER 1, 1860.

This day came the plaintiff by its attorneys and filed its præcipe for an execution, as follows:

U. S. Dis'ct Court, dis'ct of Wisconsin.

BOSTON LOCOMOTIVE WORKS
qst.
THE MILWAUKEE & SUPERIOR RAILROAD COMPANY.

To clerk of said court:

Please issue fi. fa. in the above-entitled action, returnable first Monday in Dec., 1860, and oblige yours, &c.,

KNOWLTON, PRICHARD & JACKSON,
Pl'ff's Att'ys.

Whereupon an execution issued, as follows:

9 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded that of the goods and chattels of Milwaukee and Superior Railroad Company in your district you cause to be made the sum of twenty-one thousand six hundred and thirty-four dollars and forty-five cents, which Boston Locomotive Works lately in the District Court of the United States for the district of Wisconsin aforesaid recovered against it for its damages which it had sustained on occasion of the non-performance of certain promises and undertakings, and also twenty-one dollars and twelve cents, which were awarded to the said Boston Locomotive Works for its costs and charges by it about its suit in that behalf expended, whereof the said Milwaukee and Superior Railroad Company was convicted as appears to us of record. And if sufficient goods and chattels cannot be found, then you are hereby commanded that you cause the amount of such judgment as aforesaid to be made of the lands and tenements of said Milwaukee and Superior Railroad Company, which it shall have had at the time of the docketing of such judgment, to wit, on the second day of October, one thousand eight

hundred and sixty, or at any time thereafter; and have you that money before the judge of the said District Court at Milwaukee on the first Monday of December instant, then and there to render to the said Boston Locomotive Works for its damages and costs aforesaid. And have you then and there this writ.

Witness the Honorable Andrew G. Miller, judge of the District Court of the United States for the district of Wisconsin, at the city of Milwaukee, in the district of Wisconsin, this first day of December, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

[SEAL.] J. M. MILLER, *Clerk.*

10 And afterwards, and on or before the return day of said execution, came the said marshal and returned the same with his return endorsed therein, as follows:

"No property found whereon to levy and satisfy this execution or any part thereof.

"J. H. LEWIS, *Marshal.*
"By F. HENRY, *Dep.*"

Fees, $11 06.

Endorsed: 84. January term, 1861. Boston Locomotive Works *vs.* Milwaukee and Superior Railroad Company. Fi. fa. Collect damages, $21,634 45. Interest, Oct. 2, 1860. Costs: clerk, $8 80; marshal, 2 32; attorney, 10=21 12. Knowlton, Prichard and Jackson, plaintiff's attorneys. Rec'd Dec. 1st, 1860, at 8 o'clock a. m.

11 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, Edward Kurtz, clerk of the Circuit Court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the records and proceedings in the suit of Boston Locomotive Works *vs.* Milwaukee and Superior R. R. Co.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district of Wisconsin, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the said United States the ninety-third.

[SEAL.] EDWARD KURTZ, *Clerk.*

12 Pleas before the Honorable Arthur McArthur, judge of the second judicial circuit, State of Wisconsin and presiding judge of the Circuit Court within and for the county of Milwaukee, at a term of said court began and held at the court-house, in the city of Milwaukee, on the second Monday of February, A. D. 1859.

Andrew J. Langworthy, esq., sheriff.

MATTHEW KEENAN, *Clerk.*

BOSTON LOCOMOTIVE WORKS
against
MILWAUKEE & SUPERIOR RAILROAD COMPANY,
and Sela Chamberlain.

Be it remembered that heretofore, to wit, on the 26th day of January, A. D. 1859, came the said plaintiff by its attorneys, and filed in the office of the court aforesaid its certain summons and complaint, in the words and figures following, to wit:

Circuit Court for Milwaukee county.

BOSTON LOCOMOTIVE WORKS
against
MILWAUKEE & SUPERIOR RAILROAD COMPANY,
Sela Chamberlain, defendants.

The State of Wisconsin to Milwaukee & Superior Railroad Company, and Sela Chamberlain:

You are hereby summoned and required to answer the com-
13 plaint in this action which has been filed in the office of the clerk of this Circuit Court for Milwaukee county, and of which, or copy of which is herewith served on you, and to serve a copy of your answer to said complaint on the subscribers at their office, in the city of Janesville, Rock co., Wis., within twenty days after the service hereof, exclusive of the day of such service, and if you answer said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in said complaint.

Dated January 24th, 1859.

Yours, &c.,

KNOWLTON, PRITCHARD & JACKSON,
Pl'ff's Att'ys, Janesville, Rock Co., Wisc.

Witness the Hon. Arthur McArthur, judge of said court, this 24th day of January, A. D. 1859.

[SEAL.]

Circuit Court, Milwaukee county.

BOSTON LOCOMOTIVE WORKS
agst.
MILWAUKEE & SUPERIOR RAILROAD COMPANY,
and Sela Chamberlain.

The above-named plaintiff respectfully shows unto this court upon information and belief that on the first day of December, A. D. 1856,
it was, and still is, a body politic and corporate, duly incor-
14 porated in pursuance with the provisions of an act of the legislature of the Commonwealth of Massachusetts, entitled "An act to incorporate the Boston Locomotive Works;" approved March 10th, A. D. 1848.

This plaintiff further shows, upon information and belief, that said defendant, Milwaukee & Superior Railroad Company, is a body politic and corporate, duly incorporated in pursuance with the provisions of an act of the legislature of the State of Wisconsin, entitled "An act to incorporate the Milwaukee & Superior Railroad Company," approved March fourth, A. D. 1856.

This plaintiff further shows that some time in the fore part of the month of December, A. D. 1856, one C. R. Alton, who then was the duly elected president of the said defendent, Milwaukee & Superior Railroad Company, applied to this plaintiff as the president of and for the said defendant, Milwaukee & Superior Railroad Company, and desired this plaintiff to erect and construct for said Milwaukee & Superior Railroad Company five locomotive engines and tenders.

This plaintiff further shows that it did, on the sixteenth day of December, A. D. 1856, agree to and with the said C. R. Alton, president of said Milwaukee & Superior Railroad Company, to erect and construct for said railroad company five locomotive engines and tenders of the following dimensions: cylinder 15-inch at 24
15 inch stroke, driving wheels five feet in diameter, boiler to contain 140 flues, eight-wheel tenders, with tank of sufficient capacity to contain eighteen hundred gallons, with all the fixtures necessary to make the engines and tenders complete. Said engines and tenders were to be made and delivered to the said Milwaukee & Superior Railroad Company, at the city of Buffalo, in the State of New York as follows: one of said locomotive engines and tenders was to be delivered to the said Milwaukee & Superior Railroad Company, at Buffalo, on the first day of July, A. D. 1857, and one on the first day of November, A. D. 1857.

This plaintiff further shows that said C. R. Alton, as the president of the said defendent, Milwaukee & Superior Company, agreed to and with this plaintiff to pay to this plaintiff for each of said locomotives, engines, and tenders, the sum of nine thousand dollars to be paid in two equal payments in nine and twelve months from the day of the delivery of said locomotive engines and tenders, in the city of Buffalo aforesaid, with interest added at the rate of seven per cent. per annum; said payments to be secured by the notes of said Milwaukee & Superior Railroad Company, dated on the day of the delivery of said engines and tenders, in the city of Buffalo, con-
16 ditioned for the payment of said sum in manner aforesaid, and the said C. R. Alton, as president of said Milwaukee & Superior Railroad Company, further agreed to place in the hand of this plaintiff, as collateral security for the payment of the said notes, a sufficient amount of the bonds of said Milwaukee & Superior Railroad Company, due in ten years from date, drawing interest at eight per cent. per annum, taken at the rate of seventy-five per cent., to equal the sum of the purchase money of said engines and tenders, together with certain mortgages upon real estate lying along the line of the road of the said railroad company, commonly called "farm mortgages," which said mortgages were to be assigned to this plaintiff as collateral security for payment of said bonds; and it was

further agreed that if said notes hereinbefore mentioned were not paid when the same became due and payable by the terms thereof, then this plaintiff should have the right and authority to sell and dispose of said mortgages and said bonds, and apply the nett proceeds of such sale to the payment of said notes, accounting to the said defendant, Milwaukee & Superior Railroad Company, for any surplus moneys if any there should be after paying and discharging said notes.

This plaintiff further shows that in pursuance with the
17 agreement made with the said C. R. Alton, president of the said Milwaukee & Superior Railroad Company, this plaintiff did make and construct, and did deliver to the said defendant, Milwaukee & Superior Railroad Company, at the city of Buffalo, in the State of New York, on the ninth day of July, A. D. 1857, one locomotive engine and tender, called the "Mequon," and did make and construct and did deliver to said defendant, Milwaukee & Superior Railroad Company, at the city of Buffalo aforesaid, on the first day of September, A. D. 1857, one other locomotive engine and tender called "Ozaukee."

This plaintiff further shows that on the sixteenth day of July, A. D. 1867, the said defendant, Milwaukee & Superior Railroad Company, did, to secure the payment of the purchase money of said locomotive engine and tender "Mequon," make and execute its two certain promissory notes in writing, bearing date on that day, and signed by the said defendant, Milwaukee & Superior Railroad Company, by C. R. Alton, president, in and by one of which said notes the said Milwaukee & Superior Railroad Company, by their president, C. R. Alton, duly authorized, promised for value received to pay to the order of said president nine months after the date thereof the sum of forty-seven hundred and thirty-six dollars and twenty-
18 five cents, at the office of M. R. Jessup & Co., number forty-four Exchange Place, in the city of New York, in the State of New York; and in and by the other of said notes, the said Milwaukee & Superior Railroad Company, by their president, C. R. Alton, duly authorized, promised for value received to pay to the order of said president twelve months after date the sum of forty-eight hundred and fifteen dollars, at the office of M. R. Jessup & Co., number forty-four Exchange Place, in said city of New York, both of which said notes were duly endorsed by the said C. R. Alton, president, and delivered to this plaintiff.

This plaintiff further shows that at the time the said notes above-mentioned were delivered to this plaintiff by the said defendant, Milwaukee & Superior Railroad Company, the said defendant, Milwaukee & Superior Railroad Company, also delivered to this plaintiff bonds of said Milwaukee & Superior Railroad Company amounting in all to the sum of twelve thousand and eight hundred dollars, together with said farm mortgages of the same amount, which mortgages were assigned to this plaintiff as collateral security for the payment of the sum of money mentioned in said bonds; and the said defendant, Milwaukee & Superior Railroad Com-

pany, did, at the same time, deliver to this plaintiff an instru-
19 ment in writing signed by its said president, C. R. Alton, in and by which it acknowledged that it had deposited with this plaintiff said bonds and said mortgages above-mentioned as collateral security for the payment of the said two promissory notes above mentioned, made by the said Milwaukee & Superior Railroad Company and said Milwaukee & Superior Railroad Company, in and by which said instrument duly authorized this plaintiff, its president or treasurer to sell said bonds and said mortagages, without notice, at public or private sale, at the option of this plaintiff, its president or treasurer, in case of the non-payment of said notes above mentioned, and to apply the nett proceeds of such sale of said bonds and mortgages to the payment of said notes and the interest thereon, this plaintiff to account to the said Milwaukee & Superior Railroad Company for the surplus moneys on such sale, if any there should be, after paying and satisfying said two notes, and the said defendant, Milwaukee & Superior Railroad Company, did, in and by said instrument, agree that if such sale should be made of said bonds and said mortgages, and the sum of money arising from such sale should be insufficient to pay and satisfy said notes, then said Milwaukee
20 & Superior Railroad Company would forthwith, after such sale, pay to this plaintiff the amount of such deficiency with legal interest.

This plaintiff further shows that on the ninth day of October, A. D. 1857, the said C. R. Alton, president of said Milwaukee and Superior Railroad Company, delivered to this plaintiff, to receive the payment of the purchase money of the said locomotive engine and tender, "Ozaukee," two certain promissory notes, in writing, bearing date on the eighth day of September, A. D. 1857, and signed by the said Milwaukee and Superior Railroad Company, by C. R. Alton, president, in and by one of which said notes the said Milwaukee and Superior Railroad Company, by their president, C. R. Alton, duly authorized, promised for value received to pay to the order of said president nine months after the date thereof the sum of four thousand five hundred and sixty-two dollars and forty-four cents, at the office of M. R. Jessup & Company, number forty-four Exchange Place, in the said city of New York, and in and by the other of said notes the said Milwaukee and Superior Railroad Company, by their president, duly authorized, promised for value received to pay to the order of said president, twelve months after date, the sum of four thousand five hundred and sixty-two dollars and forty-four cents, at the office of M. R.
21 Jessup & Co., number forty-four Exchange Place, in said city of New York.

This plaintiff further shows that on the twenty-second day of December, A. D. 1857, the said Milwaukee and Superior Railroad Company delivered to this plaintiff its bonds to secure the payment of said note last above mentioned, amounting in the whole to the sum of nine thousand two hundred dollars, together with farm mortgages of the same amount as collateral security for the payment of said bonds, and that such bonds and mortgages, taken at seventy-five per

cent. on the dollar, if binding at law, were insufficient to secure the payment of the purchase price of the said engine and tender last above mentioned, and that the said defendant, Milwaukee and Superior Railroad Company, have wholly failed and refused to deliver to this plaintiff a sufficient amount of its said bonds and said farm mortgages to secure to this plaintiff the payment of the purchase money of said engine and tender, as it had agreed with this plaintiff, although often requested by this plaintiff so to do.

This plaintiff further shows, upon information and belief, that said C. R. Alton was at the time of the making of the said contract between this plaintiff and the said Milwaukee and Superior Railroad Company, and at the time of making and delivery of said
22 notes for said locomotives, engines, and tenders, then duly elected and authorized president of said Milwaukee and Superior Railroad Company, and had full power and authority to make and enter into contracts for and on the part of, and to bind the said defendant, Milwaukee and Superior Railroad Company.

This plaintiff further shows that at the time of making said contract and during the negotiations between this plaintiff and the said C. R. Alton, president of said Milwaukee and Superior Railroad Company, the said C. R. Alton, as such president, stated and represented to this plaintiff that the road of said Milwaukee and Superior Railroad Company traversed a rich, fertile and productive section of country; that the city of Milwaukee had taken one hundred thousand dollars' worth of stock in said Milwaukee and Superior Railroad Company; that said Milwaukee and Superior Railroad Company had received in exchange for stock notes with mortgages on improved farms lying upon and contiguous to the railroad of said Milwaukee and Superior Railroad Company, to the amount of two hundred and seventy thousand dollars; that said Milwaukee and Superior Railroad Company had received in money for and on the stock of said railroad company the sum of fifty thousand dollars, and that at least
23 fourteen miles of said railroad of said Milwaukee and Superior Railroad Company would be complete in the month of September. A. D. 1857.

This plaintiff further shows upon information and belief that said Milwaukee and Superior Railroad Company have never received mortgages on real estate in exchange for stock of said railroad company to the amount two hundred and seventy thousand dollars, but that all the mortgages received by said railroad company in exchange for stock of said company amount to a much less sum.

That the sum of fifty thousand dollars in money had never been received by said railroad company in exchange for the stock of said railroad company, nor had the said railroad company ever received any money in exchange for or on the stock of said Milwaukee and Superior Railroad Company, and that the said city of Milwaukee then had not taken any stock in said Milwaukee and Superior Railroad Company whatever, all of which statements and representations were false and unfounded.

This plaintiff further shows that C. R. Alton, as president of said

railroad company, further stated and represented to this plaintiff that said mortgages called farm mortgages were mortgages on improved and valuable farms lying upon the line of and contiguous to said railroad of said Milwaukee and Superior Railroad Com-
24 pany, and were taken for the most part at one-half, and in no case more than two-thirds of the actual market value of said lands; that said mortgages were ample and sufficient security for the payment of the sum mentioned in the notes and bonds of said railroad company accompanying the same, and that if said notes of said Milwaukee and Superior Railroad Company were not paid at maturity, the said bonds and said notes and mortgages could be easily sold in market for a sufficient sum to pay and discharge said notes.

This plaintiff further shows upon information and belief that said farm mortgages are not mortgages upon, and do not cover improved and valuable farms; that the lands described in said mortgages do not lie upon the line of nor contiguous to the railroad of said Milwaukee and Superior Railroad Company; that said mortgages are given to secure a much greater sum than one-half or two-thirds of the actual market value of said lands, and in very many instances are given to secure the payment of a much greater sum than the actual market value of said lands, and that said mortgages are not ample and sufficient security for the payment of the sum mentioned in the notes and bonds of said Milwaukee and Superior Railroad
25 Company accompanying said mortgages, but that said mortgages are worthless, and are not security for the payment of any sum whatever, and cannot be sold in market at any price.

This plaintiff further shows upon information and belief that the said Milwaukee and Superior Railroad Company received said farm mortgages and notes accompanying the same, and each and every of them of the respective mortgages, at par, in exchange and full payment for its stock at par; and that as part of said mortgage contract and transaction the said Milwaukee and Superior Railroad Company made, executed, and delivered to each of said mortgagors an instrument in writing, whereby the said Milwaukee and Superior Railroad Company agreed with each of said mortgagors and became bound by the terms of each of said instruments to pay as the same became due and payable the eight per cent. interest mentioned, and to be paid by the terms of each of said mortgages.

And this plaintiff. on information and belief, alleges that said Milwaukee and Superior Railroad Company never had at any time any right, power or authority to so as aforesaid take or receive said farm mortgages and accompanying notes, or any or either of them, nor make any agreements to pay the interest as aforesaid, and that by means thereof the said notes, mortgages and instru-
26 ments as to the payment of the interest of said railroad company, are all and every of them void and no effect.

This plaintiff further shows that during such negotiations the said C. R. Alton, as president of said railroad company, further stated and represeuted to this plaintiff that the said work on the said railroad of said Milwaukee and Superior Railroad Company was then

being, and would thereafter be, prosecuted vigorously, and that at least fourteen miles of said railroad would be complete in the months of September, A. D. 1857; but this plaintiff states upon information and belief that the work on said railroad has never been prosecuted vigorously, and that five miles, or thereabouts, is all of said railroad that has ever been completed.

This plaintiff further shows that during said negotiations for said engines aforesaid the said C. R. Alton, as such president, further stated and represented that the title to the lands conveyed to the said Milwaukee and Superior Railroad Company, described in said farm mortgages, was perfect and unincumbered, and that the purchaser on the foreclosure and sale of the mortgaged premises would be possessed of a perfect and unincumbered title in fee simple
27 thereof; but this plaintiff shows upon information and belief that the title to the largest portion of the lands described in said farm mortgages is imperfect and encumbered, and in very many cases worthless, and that the same are no security for the sum of money mentioned in said note and bond accompanying the same.

And this plaintiff further shows that it had no knowledge or information concerning the road of the said defendant, Milwaukee and Superior Railroad Company, in regard to its route, the time in which the same could be completed, the worth of the same when completed, or its earnings when in complete operation, but relied implicitly upon such statements and representations of the said C. R. Alton, as president of said railroad company.

And this plaintiff further shows, upon information and belief, that such representations were false, and have no foundation in fact; and that they, and each of them, were made and published for the sole and only purpose of inducing and obtaining credit for the said defendant, Milwaukee and Superior Railroad Company, in the purchase of said engines and tenders, and materials for the erection and construction of its said railroad, but the said C. R. Alton never at any time stated or intimated to this plaintiff that said railroad com-
28 pany had no right, power, or authority to take or receive said farm mortgages or to enter into the contract or agreement in relation thereto, as aforesaid it had done.

This plaintiff further shows, that, implicitly relying upon and believing to be true the said statements and representations that said defendant, Milwaukee and Superior Railroad Company, had received the sum of fifty thousand dollars for stock; that it had received in exchange for its sock notes of divers persons, amounting to the sum of two hundred and seventy thousand dollars, together with mortgages on improved farms lying upon and contiguous to their said railroad, to secure the payments of the said notes; that said mortgages were for no more than one-half or two-thirds of the actual market value of said lands; that said railroad company had power to take said farm mortgages in payment for their stock as aforesaid; that said mortgages were ample security for the payment of said notes; that said defendant, Milwaukee and Superior Railroad Company, was a solvent and responsible corporation, or company, fully

able to pay and discharge all its liabilities; that the said bonds of the said defendant, Milwaukee and Superior Railroad Company,
29 were valid and sufficient to secure the payment of the sum of money therein mentioned to be paid, and that the said promissory notes, together with said farm mortgages so to be assigned and delivered to this plaintiff, with the bonds of said defendant, Milwaukee and Superior Railroad Company thereto annexed, would be ample and sufficient security for the payment of the purchase price of said engines and tenders; this plaintiff did agree to, and did sell and deliver to the said defendant, Milwaukee and Superior Railroad Company, said engines and tenders upon the terms and conditions hereinbefore set forth.

This plaintiff further shows, that upon the failure and refusal of the said defendant, Milwaukee and Superior Railroad Company, to deliver to this plaintiff said farm mortgages and its bonds, as hereinbefore set forth, and upon being informed that said representations made by the said C. R. Alton, president of said defendant, Milwaukee and Superior Railroad Company were false and unfounded, it refused to deliver to the said defendant, Milwaukee and Superior Railroad Company, the balance of said five engines and tenders, and never has delivered to said defendant, Milwaukee and Superior Railroad Company, the other three of said five engines and tenders above mentioned.

30 This plaintiff further shows, that by reason of such false statements and representations by the said C. R. Alton, president of the said defendant, Milwaukee and Superior Railroad Company, that the title and property of this plaintiff in the said engines and tenders "Mequon" and "Ozaukee" never passed from this plaintiff, or rested in the said defendant, Milwaukee and Superior Railroad Company; that this plaintiff is the legal holder and owner of said engines and tenders, and is lawfully entitled to the possession thereof, and that they, and each of them are wrongfully detained by the said defendants.

This plaintiff further shows that said defendants claim to hold said engines and tenders, by and in virtue of the above-mentioned agreement, and that the same have not been taken for any tax assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of this plaintiff.

This plaintiff further shows that said defendant, Milwaukee and Superior Railroad Company, have wholly failed and refused to pay said notes hereinbefore mentioned, or any or either of them, or any part thereof, or the interest thereon.

This plaintiff further shows, upon information and belief, that one Sela Chamberlain is in possession of one or both of said
31 engines and tenders, under and by virtue of a lease or contract for the use of the same.

This plaintiff further shows that the said notes so made and delivered to this plaintiff by the said defendant, Milwaukee and Superior Railroad Company, together with said farm mortgages and said bonds of said defendant, Milwaukee and Superior Railroad Company, are

now in the possession of this plaintiff, and that this plaintiff is ready and willing, and hereby offers to deliver to said defendant, Milwaukee and Superior Railroad Company, each and every of said notes, mortgages and bonds so delivered by said defendant, Milwaukee and Superior Railroad Company, to this plaintiff, as aforesaid, upon the redelivery to this plaintiff of said engines and tenders above named.

This plaintiff, therefore, demands the judgment of this court, that this plaintiff recover the possession of each of said engines and tenders so delivered by this plaintiff to the said defendant, Milwaukee and Superior Railroad Company, or that this plaintiff recover the value thereof in case a delivery of the same cannot be had, together with damages for the detention thereof, and that this plaintiff have such other or further relief in the premises as it shall be entitled to and as shall be agreeable to equity.

KNOWLTON, PRICHARD & JACKSON,
Pl'ffs' Att'ys, Janesville, Wisc.

32 STATE OF MASSACHUSETTS,
City of Boston, County of Suffolk:

Holmes Hinkley, being first duly sworn, deposes and says: That he is the president of the plaintiff, Boston Locomotive Works; that he has read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated upon information and belief, and as to those matters he believes it to be true; that all the material allegations in said complaint, except those stated upon information and belief, are within his personal knowledge; that his information is derived from an examination of the act incorporating said defendant, Milwaukee and Superior Railroad Company, from an examination of the reports of the directors of said railroad company for the year A. D. 1857, from an examination of the report of a select committee appointed by the assembly of the State of Wisconsin for the years 1857 and 1858 to investigate the affairs of the said defendant, Milwaukee and Superior Railroad Company, and from an examination of certified abstracts of the title of the real estate conveyed in and by said farm mortgages, and also from the statements and advice of the counsel of the plaintiff in this action, and that the
33 same are the grounds of his belief, and that he makes this affidavit because the said plaintiff is a corporation, and unable to make the same.

HOLMES HINKLEY.

Subscribed and sworn before me this sixth day of January, A. D. 1859.

[SEAL] CHAS. B. F. ADAMS,
Commissioner of Deeds for the State of Wisconsin, in the State of Massachusetts.

Afterward, to wit, on the 16th day of February, A. D. 1859, came the said defendant, Milwaukee and Superior Railroad Company, by its said attorney, and filed in the office of the clerk of the court aforesaid its certain answer, in the words and figures following, to wit:

Circuit Court for Milwaukee county.

THE MILWAUKEE & SUPERIOR RAILROAD COMPANY, impleaded with Selah Chamberlain, *ads.* THE BOSTON LOCOMOTIVE WORKS.

The above-named defendant, the Milwaukee & Superior Railroad Company, for answer to the complaint in this action, says:

That whether or not, at the time of making the contract, and during the negotiations between the plaintiff and the said C. R. Alton, president of this defendant, mentioned and set forth in said complaint, the said Alton, as such president, stated and represented to the plaintiff that the city of Milwaukee had taken one hundred
34 thousand dollars' worth of stock in this defendant, or that this defendant had received in exchange for stock notes with mortgages on improved farms lying upon and contiguous to the railroad of this defendant to the amount of $270,000, or that this defendant had received in money, for and on the stock of defendant, the sum of $50,000, or that fourteen miles of said railroad of this defendant would be complete in the month of September, 1857, or that said mortgages called farms mortgages were mortgages on improved and valuable farms lying upon the line of and contiguous to said railroad of this defendant, or were taken for the most part at one-half, and in no case more than two-thirds of the actual market value of said lands, or that said mortgages were ample and sufficient security for the payment of the sum mentioned in the notes and bonds of this defendant accompanying the same, or that if said notes of this defendant were not paid at maturity, the said bonds and said notes and mortgages could be easily sold in market for a sufficient sum to pay and discharge said notes, or that the title to the lands conveyed to this defendant, described in said farm mortgages, was perfect and unincumbered, or that the purchaser in the foreclosure and sale of the mortgaged premises would be possessed of a perfect and
35 unincumbered title in fee simple thereof, and whether the said Alton, as such president, stated and represented any or all of the matters aforesaid, as stated and set forth in said complaint, this defendant has not any knowledge or information thereof sufficient to form a belief, and therefore leaves the plaintiff to make proof thereof as he shall be advised.

And whether the said plaintiff agreed to sell, and did sell and deliver said engines and tenders upon the terms and conditions set forth in the complaint, implicitly relying upon and believing to be true such statements and representations, or any of them, so in said complaint alleged to have been made to the plaintiff by said C. R.

Alton, as president of this defendant, as aforesaid, this defendant says, it has no knowledge or information thereof sufficient to form a belief, and leaves the plaintiff to prove their allegations in that behalf.

And this defendant denies, upon information and belief, that by reason of anything in said complaint alleged the title and property of the plaintiff in the said engines and tenders "Mequon" and "Ozaukee" has failed to pass from the plaintiff, or to rest in this defendant, and denies that the plaintiff is now the legal owner of said engines and tenders, or is lawfully entitled to the possession thereof, or that they, or either of them, are wrongfully detained by this defendant.

36 And this defendant denies that the defendant, Sela Chamberlain, has any lease or contract for the use of said engines or tenders.

This defendant further avers, upon information and belief, that at or about the time the said statements and representations are in said complaint alleged to have been made by said Allston, this defendant had received mortgages on real estate in the vicinity of the line of their said road, to be exchanged for the stock of this defendant, to an amount nearly or quite $270,000. That a portion of said mortgages were afterwards found to be upon lands of which the title was imperfect or incumbered, and were therefore rejected as worthless.

That this defendant has in fact received in exchange for its stock, farm mortgages as aforesaid, to the amount of $205,400.

That at or about the time aforesaid the city of Milwaukee had loaned its bonds to this defendant in aid of the construction of its road to the amount of one hundred thousand dollars.

And this defendant further avers, upon information and belief, that said farm mortgages are nearly all mortgages upon and do cover improved and valuable farms; that the lands described in said mortgages do lie upon or near the railroad line of this defendant;

37 that said mortgages were not given to secure a much greater sum than one half or two-thirds of the actual market value of said lands, nor are they in many instances given to secure the payment of a much greater sum than the actual market value of said lands, nor are they in many instances given to secure the pay- that said mortgages are in nearly every instance ample and sufficient security for the payment of the sum mentioned in the notes and the bonds of this defendant accompanying said mortgage, and are not worthless, and are security for the payment of the sums for which they were assigned to the plaintiff.

But whether they can be sold in the market at any price or not, this defendant has no knowledge or information sufficient to form a belief, but avers that if they cannot be sold in market, it is not because said farm mortgages, or the lands therein described, have no intrinsic value.

This defendant further saith it is informed and believes, and therefore states, that it had full right, power, and authority to take and

receive said farm mortgages and accompanying notes in exchange for its stock, and to make such agreements to pay the interest thereon as in the complaint mentioned and set forth, and that said mortgages and notes are, in all respects, valid and binding upon the makers thereof.

And this defendant further saith that the work on its rail-
38 road was, during the early part of the year 1857, prosecuted vigorously, and that fourteen miles thereof would have been completed, as this defendant verily believes, in the month of September, if the financial crisis of July and August had not occurred and prevented this defendant from procuring the necessary means for the completion thereof.

This defendant further states, upon information and belief, that the title to all the lands described in said farm mortgages so delivered to the plaintiff is perfect and unincumbered and that the same are good security for the sum of money mentioned in said note and bond accompanying the same.

And this defendant, upon information and belief, denies the said representations if made as in the complaint alleged were false, and had no foundation in fact, or that they, or any or either of them, were made or published for the purpose of inducing or obtaining credit for this defendant in the purchase of said engines and tenders.

And this defendant saith that whether the plaintiff hath no knowledge or information concerning the road of this defendant in regard to its route, the time in which it could be completed, the worth of the same when completed, or its earnings when in complete
39 operation, and whether the plaintiff relied implicitly upon such alleged statements and representations of the said Alton as president of this defendant, and whether the said notes so made and delivered to the plaintiff by this defendant, together with said farm mortgages, and said bonds of this defendant, are now in the possession of the plaintiff, this defendant has no knowledge or information thereof sufficient to form a belief.

This defendant, for a further answer and defence to the complaint, says that the said engines and tenders so sold and delivered to this defendant were, immediately after their delivery, placed by this defendant upon its said railroad in the county of Milwaukee, and have been since that time used and employed as a part of the rolling stock of said road of this defendant.

That on or about the 1st day of January, 1857, this defendant executed and delivered to the Farmers' Loan and Trust Company, of the city of New York, a mortgage or trust deed of its road, property, and franchises, including all rolling stock, fixtures, &c., as well that then in possession as that which should thereafter be acquired, to secure bonds of this defendant, which were, long before the commencement of this action, issued and disposed of to the amount of one
40 hundred and seventy thousand dollars.

That said engines and tenders belong and are attached to the railroad of this defendant, as defendant is informed and believes, and are embraced in and covered by said mortgage.

Wherefore this defendant prays that said complaint may be dismissed with costs.

JOSHUA STARK,
Att'y for Defendant, Mil. & Sup. R. R. Co.

STATE OF WISCONSIN, *County of Milwaukee, ss:*

Joshua Stark, secretary of the Milwaukee & Superior Railroad Company, the defendant above named, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOSHUA STARK.

Sworn to this 15th day of February, 1859, before me.
WILLIAM H. FOSTER,
Notary Public, Milwaukee, Wis.

Afterwards, to wit:

March 26, 1859, affidavit of A. A. Jackson. Rule for commission and direct interrogatories on the part of the plaintiff filed.

April 2, 1859, cross-interrogatories filed.

April 7, 1859, commission issued and deposited in the
41 post office, addressed to Owen G. Peabody, esq., Boston, Massachusetts.

May 20, 1859, commission returned with depositions of Joseph F. Morton and Daniel F. Child, taken before Owen G. Peabody, commissioner, filed.

June 20, 1859, note of issue filed.

December 17, 1859, note of issue filed.

December 21, 1859, note of issue filed.

January 12, 1865, deposition of Wm. H. Ramsey filed.

January 13, 1860. And now come the parties by their attorneys. and on motion of plaintiff's attorneys ordered, that this action be and is hereby discontinued at the costs of the plaintiff.

Judgment January 13, 1860.

This action having been discontinued on motion of the plaintiff's attorneys, and an order having been entered herein by the court, the Hon. Arthur McArthur presiding judge, this thirteenth day of January, 1860, whereby this action is discontinued at the costs of the plaintiff—

Now, on motion of Joshua Stark, attorney for the defendant, the Milwaukee and Superior Railroad Company, and Emmons and Van Dyke and Hamilton. attorneys for Sela Chamberlain, it is adjudged that this action be discontinued, and that the defendants, Milwaukee and Superior Railroad Company, and Sela Chamberlain, recover of Boston Locomotive Works, plaintiff, the sum of thirty-seven dollars and seventy-seven cents costs and disbursements by them in
42 this behalf sustained.

MATTHEW KEENAN, *Clerk.*

Statement.

Judgment docketed January 19th, 1860, at 10 o'clock a. m.
Costs and disbursements, $37 77.

Circuit Court, Milwaukee county.

STATE OF WISCONSIN, *ss:*

I, James Hickcox, clerk of said court, do hereby certify that I have compared the foregoing copy with the original record and proceedings entered in the action therein entitled; that it is a correct transcript therefrom and of the whole thereof, as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 27 day of December, A. D. 1865.

[SEAL.] JAMES HICKCOX, *Clerk.*

STATE OF WISCONSIN, *County of Milwaukee, ss:*

I, Arthur McArthur, do hereby certify that I am judge of the second judicial circuit of said State, and presiding judge of the Circuit Court within and for the county of Milwaukee; that James Hickcox, whose name is subscribed to the certificate subjoined to the within record, is, and was at the date of said certificate, clerk of the Circuit
43 Court of the county of Milwaukee and State aforesaid, duly elected and qualified; that I am well acquainted with his handwriting, and know the signature thereto to be genuine; and further, that said certificate or attestation is in due form of law, and that the seal thereto attached is the proper seal of said court.

Witness my hand at Milwaukee, this day of December, A. D. 1865.

The foregoing record was offered and received in evidence on behalf of the defendants, Cross, Ludington, and Scott, at the hearing of Drury & Page *v.* Milwaukee & Superior Railroad Company and others.

Dec. 27th, 1865.

A. G. MILLER,
District Judge.

44 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, Edward Kurtz, clerk of the Circuit Court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a copy of the proceedings certified from the Circuit Court for Milwaukee county, in the suit of Boston Locomotive Works against Milwaukee & Superior Railroad Company et al.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said district of

Wisconsin, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the said United States the ninety-third.

[SEAL.] EDWARD KURTZ, *Clerk.*

45 District Court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a stated term of the District Court of the United States of America for the district of Wisconsin, began and held according to law at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the third day) of January, A. D. 1859: Present, the honorable Andrew G. Miller, judge of said court, presiding, Major J. Thomas, marshal, John M. Miller, clerk.

Among other, the following proceedings were had, to wit:

THE FARMERS' LOAN AND TRUST COMPANY, complainant, *vs.* THE MILWAUKEE and SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm, and Gottfried Wootsch, defendants. } In equity.

Be it remembered that heretofore, to wit, on the 13th day of December, A. D. 1858, came the above-named complainant by its solicitors, Messrs. Emmons, Van Dyke & Hamilton, and filed its bill of complaint against the above-named defendants, as follows, to wit:

46 *Bill of complaint.*

To the Honorable Andrew G. Miller, judge of the District Court of the United States for the district of Wisconsin, in equity.

The Farmers' Loan and Trust Company, a corporation duly constituted and organized under and by virtue of the laws of the State of New York, by Emmons, Van Dyke & Hamilton, their solicitors, brings this their bill of complaint against the Milwaukee and Superior Railroad Company, a corporation duly constituted and organized under and by the laws of the State of Wisconsin, and all of whose directors reside in said State, the city of Milwaukee in said State of Wisconsin, and John Stewart, Johann C. A. Allerding, Christian Hahm, Gottfried Wootsch, all of whom reside in and are citizens of said State of Wisconsin, the defendants in this action; and thereupon your orators, the said Farmers' Loan and Trust Company, complain and say, that the said defendants, Milwaukee and Superior Railroad Company, heretofore, to wit, on the first day of January, one thousand eight hundred and fifty-seven, at the city of Milwaukee, in said

State of Wisconsin, in pursuance of the power and authority in it vested by the laws of said State, did execute to your orators a mortgage or trust-deed, whereby the said defendants granted, bargained, sold, transferred, and conveyed to your orators, their successor or successors in trust, and their assigns, all the following
47 present and in future to be acquired real and personal property and estate of the said defendant, that is to say, all of the first division of the said railroad of said defendant from the said city of Milwaukee to the city of Green Bay, in said State of Wisconsin, a distance of one hundred and twenty miles, including the right of way and land occupied by said first division of said road, together with the superstructure and track thereon, and all rails and other materials used thereon, bridges, viaducts, culverts, fences, equipment, necessary depot grounds, and buildings thereon belonging to the said railroad company, and all rolling stock, engines, tenders, cars, tools, materials, machinery, fixtures, and all other personal property appertaining to said first division of said road, and all rights thereto, and interests to be acquired by said defendant, the Milwaukee and Superior Railroad Company, together with the name and functions appertaining to the said first division of said road; all tolls, rents, and income to be had or levied therefrom, and all corporate and other franchises, rights and privileges of the said railroad companyin and to or concerning the same.

To have and to hold the said premises, real and personal estate and property, and every part and parcel thereof, with the ap-
48 purtenances, unto your orators, their successor or successors in said trusts by said deed created, and assigns.

And your orators further state and show to this court, that said mortgage or trust-deed was executed and delivered to your orators to secure payment of the principal and interest of certain bonds, being twelve hundred bonds, of one thousand dollars each, proposed to be issued by the said defendant for the purpose of raising a sum of money by loan for purchasing and transporting iron rails and machinery for, and for aiding in the construction of, the railroad of said defendant, the Milwaukee and Superior Railroad Company, between the said cities of Milwaukee and Green Bay; which bonds were to be issued in amounts of one thousand dollars each, and numbered from one (1) to twelve hundred (1200) inclusive, to be dated on the first day of January, A. D. 1857, and to be on an equality so far as regards security for the payment thereof by said mortgage or trust-deed; said bonds were also to be made payable in the city of New York, on the first day of January, one thousand eight hundred and seventy-seven, and to bear interest from their date, at the rate of eight per cent. per annum, payable semi-annually on the first days of
49 January and July in each and every year, in the city of New York, until the maturity of said bonds and the principal thereof should be paid, and were to be convertible into the capital stock of said railroad company, at par, at any time within five years from the date of said bonds.

And in and by the said mortgage or trust-deed it was provided that

for the further security and ultimate redemption of the said mortgage bonds to be issued by virtue of said mortgage, or such number thereof as might have been issued and not converted into the capital stock of said railroad company, within five years from the date thereof, the said railroad company would cause to be paid to your orators, their successor or successors, in the said trust and assigns, semi-annually, on the first day of January and first day of July in each year, commencing on the first day of January, 1861, towards a sinking fund for the redemption of said bonds then outstanding, such sums as, with interest accruing thereon, should be sufficient to pay on the maturity thereof the whole amount of said bonds so issued and not converted into the capital stock, as thereinbefore provided; which sinking fund your orators were required to invest, manage, and dispose of as in said mortgage or trust-deed is more particularly set forth.

50 And it was further provided, in and by said mortgage or trust-deed, that in case the said Milwaukee and Superior Railroad Company should fail to pay the principal or any part thereof, or any of the interest or any of the said mortgage bonds issued under said mortgage or trust-deed at any time when the same should become due and payable according to the term thereof, when demanded, then, and in such case, the whole amount of the principal of said bonds should at once become due and payable, and your orators, their successor or successors in the trust thereby created, and assigns, should, upon the written request of five bona-fide holders of said bonds, cause the said premises, real and personal estate and property, rights, and franchises, or as much thereof as should be necessary to pay and discharge the principal and interest of all such mortgage bonds as might be then unpaid and unconverted, and not purchased and deposited in the sinking fund, to be sold at public auction in the city of Milwaukee and State of Wisconsin, or in the city of New York, giving at least ninety days' previous notice of the time, place, and terms of such sale, and of the real and personal property and estate, rights, and franchises to be sold by publishing the same in two newspapers, of good circulation, in each of the cities of Milwau-

51 kee and New York, aforesaid, and wherever else required by law, and execute and deliver to the purchaser or purchasers thereof a good and sufficient deed of conveyance in fee simple for the same, which should be a bar against the said Milwaukee and Superior Railroad Company, their successors and assigns, and all parties claiming under them, of all right, claim, or interest of, in, or to the said premises, real and personal estate and property, rights, and franchises, or any part thereof.

And your orators further show to the court, that the said mortgage or trust-deed was duly acknowledged, and was afterwards recorded in the office of the Secretary of State of the State of Wisconsin, on the 13th day of January, 1857, in the volume of railroad mortgages, on pages, 109, 110, 111, 112, 113, 114, 115, as by the said mortgage or trust-deed, and the certificate of acknowledgment and of the recording aforesaid endorsed thereon, and ready to be produced as this court shall direct, will more fully appear.

And your orators further state and show to this court, that under said mortgage or trust-deed five hundred and fifty bonds of one thousand dollars each, numbered from one (1) to five hundred and fifty (550) inclusive, of the description hereinbefore contained. and payable at the office of your orators in the city of New York, have
52 been duly executed under the seal of said defendant, the Milwaukee and Superior Railroad Company, and certified by your orators by D. D. Williamson, their president; that thereof one hundred bonds, numbered one (1) to one hundred, (100,) inclusive, amounting in all to one hundred thousand dollars, were, on or about the first day of March, 1857, delivered to the defendant, the City of Milwaukee, by said railroad company, as collateral security for the payment by said railroad company of the interest and principal on one hundred bonds of one thousand dollars each, issued and delivered by said city to said company, on or about the first day of March, 1857, as a loan; which said city bonds bear date the first day of January, 1857, are due twenty years from their date, and are upon interest, at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, in the city of New York; that on the 24th day of April, 1858, said defendant, the Milwaukee and Superior Railroad Company, delivered to said city of Milwaukee the further amount of twenty-eight of said mortgage bonds of said railroad company, numbered two hundred forty-one to two hundred sixty-eight, inclusive, amounting to twenty-eight thousand dollars, as further security for the payment of said
53 railroad company of the interest and principal of said city bonds; that the said one hundred and twenty-eight bonds so delivered to said city of Milwaukee are still held by said city as security, as aforesaid.

That some time in the year 1857 the said defendant, the Milwaukee and Superior Railroad Company, purchased and received from Bailey Bro.'s & Co., of Liverpool, England, by their agents, E. B. Raymond & Co., a large quantity of railroad-iron rails, to be used in the construction of the road of said railroad company. That in pursuance of the terms of the agreement upon which said rails were purchased, said company executed its notes to said C. B. Raymond & Co. as agents of said Bailey Bro.'s & Co., conditioned for the payment of $5,478,14 on the twenty-sixth day of April, 1858; $6,394,90 on the 26th day of July, 1858; $5,478,14 on the 26th day of October, 1858; $1,124,27 on the 31st day of May, 1858; $1,124,27 on the thirty-first day of August, 1858; and $1,124,27 on the 1st day of December, 1858; and as collateral security for the payment of its said notes, in the month of September, 1857, transferred and delivered to said C. B. Raymond & Co., agents as aforesaid, as required by the terms of said agreement, forty-two of the mortgage bonds of said railroad company, numbered respectively, one hundred and one to
54 one hundred and forty inclusive, and numbers two hundred sixty-nine and two hundred and seventy. That the installment of interest on said city bonds so loaned to said railroad company, which became due on the 1st days of January and July, 1858,

have not been paid by said railroad company, and that the notes so given by said railroad company to said C. B. Raymond & Co., though due, remains wholly unpaid. That the instalments of interest due and payable upon the said one hundred and seventy bonds of said railroad company on the first days of January and July, 1858, being the sum of thirteen thousand six hundred dollars, was not paid. That payment of such interest on said 42 bonds in the hands of said C. B. Raymond & Co. was duly demanded of the said defendant, Milwaukee and Superior Railroad Company, to wit, at the office of your orators, in the city of New York, on the said first days of January and July, 1858. That more than sixty days have elapsed since such default, and the same now remains wholly unpaid, together with the whole principal and interest yet to become due on said bonds, according to the terms thereof, and that no proceedings at law have been had to recover the debt secured by the said bonds or any of them or any part thereof.

55 And your orators further state and show to the court, that they believe that the said defendants, The city of Milwaukee and John Stewart, Johann C. A. Allerding, Christian Hahm, and Gottfried Wootsch, have or claim to have some interest in the said mortgaged premises or in some part thereof, as purchasers, mortgagees, or otherwise, which interests, if any, have accrued subsequent to the said mortgage or trust deed to your orators, and are subject thereto.

Your orators further states and shows to the court, upon information and belief, that only about five miles of the track of the railroad of the said Milwaukee and Superior Railroad Company is completed and the iron rails laid thereon. That no part of the same is in use by said railroad company for the transportation of freight or passengers; that said railroad company is largely indebted to various persons, and is entirely unable to pay its debts, and has been wholly insolvent for more than one year last past; that the said mortgaged premises constitute nearly all the tangible property of said railroad company, and are wholly inadequate and insufficient to secure the payment of the interest due and of the principal and interest yet to become due on the said bonds of said railroad company as aforesaid.

Your orators therefore ask the aid of this honorable court
56 in the premises, and that the above-named Milwaukee and Superior Railroad Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm and Gottfried Wootsch, the defendants in this action, may appear before this court and answer this, your orators' bill of complaint, according to the rules and practice of said court, without oath, their answer on oath being hereby expressly waived, and that the usual decree may be made for the sale of the morgaged premises aforesaid, or of so much thereof as may be necessary for the payment to your orators of the amount due for interest upon the said bonds as aforesaid, and their costs of this action, and that the defendants and each of them, and all persons claiming under them or any of them subsequent to the commencement of this action, may be foreclosed of all interest lien and equity of redemption in the said mortgaged premises, that the proceeds of such sale

may be applied to the payment of the costs and expenses of this action, and the amount due on said mortgaged bonds, with interest thereon from the date of the decree up to the time of such payment; and that the defendant, the Milwaukee and Superior Railroad Company, may be adjudged to pay the deficiency, if any there be, that may remain after applying all of said moneys so applicable
57 thereto, and that your orators may have such other or such further relief in the premises as shall be agreeable to equity and good conscience.

And that a writ of subpœna may be issued out of and under the seal of the said court, to be directed to the said defendants, the Milwaukee and Superior Railroad Company, the City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm, and Gottfried Wootsch, respectively, therein and thereby commanding them on a certain day, and under a certain penalty, to be therein inserted, that they personally be and appear before this honorable court then and there to answer the premises and to stand to, abide by, and perform such order and decree as to this court shall seem proper, and as shall be agreeable to equity and good conscience.

EMMONS, VAN DYKE & HAMILTON,
Solicitors for Complainant.
H. L. PALMER, *Of Counsel.*

Whereupon a subpœna issued, as follows:

58 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to the Milwaukee and Superior Railroad Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm, and Gottfried Wootsch, greeting:

You are hereby commanded that you personally appear before the judge of the District Court of the United States of America for the district of Wisconsin, in our Court of Chancery, in and for the district aforesaid, on the first Monday of January next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court, by the Farmers' Loan and Trust Company.

And to do further, and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said The Milwaukee and Superior Railroad Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm, and Gottfried Wootsch, if to be found in his district, and due return thereof make.

Witness the Honorable Andrew G. Miller, judge of the District Court of the United States for the district of Wisconsin, at the city of Milwaukee, in the said district, this thirteenth day of December,

in the year of our Lord one thousand eight hundred and fifty-eight, and of our independence the eighty-third.

[SEAL.] J. M. MILLER, *Clerk.*
EMMONS, VAN DYKE & HAMILTON,
Solicitors.

It is ordered by our said court, that the said The Milwaukee and Superior Railroad Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm, and Gottfried Wootsch, the defendants aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise the bill filed may be taken as confessed.

59 *Return.*

Subpœna returned. I hereby deputize Oswald C. Kissam to serve and return this writ.

M. J. THOMAS,
U. S. Marshal.

Served on the within-named John Stewart, Johann C. A. Allerding, by leaving a copy of this subpœna at the usual place of abode of each, with a free white person, a member of the family, and served on the within-named Gottfried Wootsch by delivering him personally a copy of this subpœna, this 14th day of December, 1858.

M. J. THOMAS, *Marshal,*
By OSWALD C. KISSAM, *Sp. Deputy.*

Oswald C. Kissam, being duly sworn, says that he served this writ as above stated, and that his actual travelling expenses necessarily incurred in serving the same amounted to the sum of three dollars and fifty cents, as charged.

OSWALD C. KISSAM.

Subscribed and sworn to before me this 15th day of December, 1858.

WM. H. THOMAS,
Notary Public Mil. Co., Wis.

Served on the within-named The Milwaukee and Superior Railroad Company, by delivering a copy of this subpœna to Joshua Stark, secretary of said company, personally, and served on the within-named City of Milwaukee, by delivering a copy of this subpœna to William A. Prentiss, mayor of said city, personally, this 14th day of December, 1858.

M. J. THOMAS, *U. S. Marshal,*
By WM. H. THOMAS, *Deputy.*

Fees, $17 90.

60 DECEMBER 15, 1858.

This day came the defendant, Johann C. A. Allerding, by his solicitors, Upham & Graham, and filed his appearance, as follows:

U. S. District Court, Jan. T., 1859.

Appearance of Allerding.

THE FARMERS' LOAN & TRUST CO.
v.
THE MILWAUKEE & SUPERIOR RAILROAD CO.,
Johann C. A. Allerding, *et al.*

John Miller, Esq., clerk U. S. Dis. Court:

Please enter our appearance for Johann C. A. Allerding, one of the defendants in the above-entitled cause.
Dec. 15th, 1858.

UPHAM & GRAHAM,
Sol. for J. C. A. Allerding.

DECEMBER 20, 1858.

This day came the defendant, John Stewart, by his solicitor, Mr. Fraser, and filed his appearance, as follows:

U. S. District Court.

Appearance of Stewart.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD
Company, John Stewart, and others.

To the clerk of said court:

Please enter my appearance in this cause for John Stewart, one of the defendants therein named.
Dated Milwaukee, Dec'r 20, 1858.

A. C. FRASER,
Sol. for John Stewart.

JANUARY 3, 1859.

61 This day came the defendants, Hahn and Wootsch, by their solicitors, Upham & Graham, and filed their appearance, as follows:

U. S. Dist. Court, Jan. T., 1859.

Appearance of G. Wootsch.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE MILWAUKEE AND SUP. RAIL R. CO. *et als.*

John Miller, esq., C. U. S. Dist. Court:

Please enter our appearance for the defendant, Gottfried Wootsch, in the above suit.
Jan. 3d, 1850.

D. A. J. UPHAM &
W. GRAHAM,
Sol. for G. Wootsch.

U. S. District Court, Jan. term, 1859.

Appearance of Hahn.

THE FARMERS' LOAN AND TRUST CO.
vs.
THE MILWAUKEE AND SUP. R. R. CO. *et als.*

John Miller, esq., C. U. S. Dist. Court:

Please enter our appearance for Christian Hahn, one of the defendants in the above case.
Jan. 3d, 1859.

UPHAM & GRAHAM,
Sol. for C. Hahn.

Rule to plead.

JANUARY 3, 1859.

On motion of Emmons, Van Dyke & Hamilton, compl't's solicitors, ordered that the defendants appear and plead, answer, or demur to the complainant's bill of complaint, on file, by the 1st Monday of February next.

JANUARY 28, 1859.

This day came the defendants, John Stewart, Johann C. A. Allerding, Christian Hahn, and Gottfried Wootsch, by their solicitors, and filed their answer, as follows:

In the District Court of the United States for the district of Wisconsin, in chancery.

62 *Answer.*

The joint and several answers of Johann C. A. Allerding, John Stewart, Christian Hahm, and Gottfried Wootsch, defendants to the bill of complaint of the Farmers' Loan and Trust Company, complainant, against these defendants and the Milwaukee and Superior Railroad Company and the City of Milwaukee:

These defendants, now and at all times saving and reserving to themselves all advantage and benefit of exception to the errors and imperfections contained in the said bill of complaint, for answer thereunto, or to so much thereof as these defendants are advised it is material for them to make answer to, they answering say, that as to the mortgage or trust deed made and delivered by the said Milwaukee and Superior Railroad Company to the complainant, as set forth in said bill of complaint, and as to what property it conveyed, and whether it conveyed all the present and future real and personal property and estate of said railroad company, of the said first division of said railroad, or not, or whether said trust deed or mortgage was executed and delivered to said complainant to secure the payment of

63 the principal and interest of certain bonds to be issued, as stated in said bill, and whether all the bonds that were not converted into capital stock in five years were to be paid to said complainant or their successors or assigns, and also a sinking fund created, as stated in said bill, and whether, in case the interest on said bonds or sinking fund was not paid, that in such case the whole principal became due, as stated in said bill. and whether, under said mortgage or trust deed five hundred and fifty bonds of one thousand dollars each were actually issued or not, and whether any, or how many, were delivered to the said City of Milwaukee to secure the payments of bonds issued and delivered by said city to said railroad company, as stated in said bill, and whether said railroad company purchased a large quantity, or any, iron rail from Bailey Bros. & Co., of Liverpool, and gave their notes for the same, and also a portion of said mortgage bonds, as collateral security or not, and whether said railroad company has paid the interest on said city bonds or not, or the notes given for said railroad iron, as above stated, or the interest on said mortgage bonds, as stated in said bill, these defendants have no knowledge other than the statements in said bill of complaint, nor of any matter or detail relating to the

64 above statements in said bill, and they leave the said complainants to prove the same as they may deem proper.

And these defendants, further answering, say, that they have

some interest in the premises purporting to be mortgaged or conveyed in trust as aforesaid, and that their interest is not subsequent, but prior and paramount to said mortgage or trust deed in this, that each of these defendants was and is now the owner and occupant of a farm through which said Milwaukee and Superior Railroad Company laid and located their said railroad, in their said first division, and that by the act of the legislature incorporating said railroad company, the company could not acquire any title or interest in the land on which they located said railroad by proceeding under their act of incorporation, without having first paid for the same the amount awarded by the commissioners, or if the award was appealed from, then, without having paid the judgment obtained by the claimant in a Circuit Court of the State of Wisconsin, that said company could go on to the land, make surveys and locate the road, but that they acquired no title or interest in said land which they could mortgage or convey, without having first paid said award or judgment, as the purchase money for the same; that neither of these defendants
65 have ever sold or conveyed the right of way through their land to said company or any one else for said railroad track, but that said company proceeded to survey, locate and build said railroad through the said lands of these defendants, and called out commissioners to award the damages to these defendants for said right of way, and that from said awards these defendants severally appealed to the State Circuit Court and obtained the judgments as set forth in each case below, for the damages for taking their land for the track of said railroad, against said railroad company, as follows, to wit:

The defendant, John Stewart, the owner of the south half of the northeast quarter of section 31, town. 8, range 22, obtained judgment in the Circuit Court of Waukesha county for $600, and costs, bearing interest from June, 1857, against said railroad company for his damages for the land taken for the track of said railroad through said premises.

The defendant, Johann C. A. Allerding, the owner of the northeast quarter of the northeast quarter of section 6, town. 7, range 22, obtained judgment in June, 1857, against said railroad company in the Circuit Court of Waukesha county for $634, and costs, bearing interest from that time, for his damages for the land taken for the track of said railroad through said premises.

66 The defendant, Christian Hahm, the owner of the north ninety acres of the southeast quarter of section 31, town. 8, range 22, obtained a judgment in June, 1857, against said railroad company in the Circuit Court of Waukesha county, on which there is due $350, and costs, with interest from that time, for his damages for the land taken for the track of said railroad through said premises.

And the defendant, Gottfried Wootsch, the owner of the northeast quarter of the southwest quarter of section 35, town. 9, range 21, obtained a judgment in October, 1857, against said railroad company in the Circuit Court of Ozaukee county for $1,063, and costs, bearing interest from that date for his damages for the land taken for the track of said railroad through said premises, as by reference to

exemplified copies of said judgments ready to be produced will more fully appear.

And these defendants, further answering, say that said judgments were for the purchase money for the track of said railroad through said lands, and that the same are outstanding and unpaid, and are a prior and paramount lien on the track and real estate of said railroad company; wherefore these defendants ask that if the track, real estate and property of said railroad company shall be sold under a
67 decree of this court, that then the amount of the said judgments, costs and interest thereon, be by the order of this court decreed to be paid out of the first proceeds of such sale to these defendants as a prior lien on said property.

These defendants, further answering, say that they admit that about five miles of the track of said railroad from the city of Milwaukee have been completed, as stated in said bill, and that as to any other matters stated in said bill of complaint, further than what has above been answered, they have no knowledge, except that the same is so stated in said bill, without that any other matter or thing in the said bill of complaint contained, and not herein or hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true to their knowledge or belief. All which matters and things these defendants are ready to prove and maintain as this court shall direct, and therefore they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

JOHN STEWART,
JOHANN C. A. ALLERDING,
CHRISTIAN HAHM,
GOTTFRIED WOOTSCH,
By UPHAM & GRAHAM,
Their Solicitors and Attorneys.

D. A. J. UPHAM *Of Counsel.*

68 And now at this same term, to wit, January term, A. D. 1859, and on the 27th day thereof, to wit, on the 19th day of March, A. D. 1859, the following proceedings were had, to wit:

Decree.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD Company, city of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm and Gottfried Wootsch. } In equity.

This day this cause came on to be heard upon the pleadings, proofs and the bill taken as confessed against the Milwaukee and Superior Railroad Company, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge

and decree, that all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and described as "All the following present and in future to be acquired real and personal property and estate of the said defendant, the Milwaukee and Superior Railroad Company, that is to say: all of the first division of the railroad of said railroad company, defendant, from the city of Milwaukee to the city of Green Bay, in said State of Wisconsin, a distance
69 of one hundred and twenty miles, including the right of way and land occupied by said first division of said road, (subject to the rights and claims of the defendants Stewart, Hahm, Allerding and Wootsch, hereinafter mentioned and set forth,) together with the superstructure and track thereon, and all rails and other materials used thereon, bridges, viaducts, culverts, fences, equipments, necessary depot grounds and buildings thereon, belonging to the said railroad company, and all rolling stock, engines, tenders, cars, tools, materials, machinery, fixtures and all other personal property, appertaining to said first division of said road, and all rights thereto, and interests to be acquired by said defendant, The Milwaukee and Superior Railroad Company, together with the name and functions appertaining to the said first division of said road, all tolls, rents and income to be had or levied therefrom, and all corporate and other franchises, rights and privileges of the said railroad company, in and to or concerning the same," be sold at public auction, by or under the direction of the marshal of the United States for the district of Wisconsin.

That the said sale be made in the city of Milwaukee, in said district, and State of Wisconsin; that the said marshal give
70 public notice of the time and place of such sale, and of the real and personal property and estate, rights and franchises to be sold, by publishing such notice, for a period of not less than ninety days prior to such sale, in a newspaper published in said city of Milwaukee, and also in a newspaper published in the city of New York; and that the complainant, or any of the parties in this cause, may become the purchaser. That the marshal of said district execute and deliver to the purchaser or purchasers of the mortgaged premises on the said sale a deed thereof in due form; that said marshall, out of the proceeds of said sale, retain his fees, disbursements and commissions on said sale, and that he bring the balance of said proceeds into court without delay, to abide the further order of this court, unless said mortgaged premises shall be bid off by or on behalf of the complainant, in trust for the holders of the bonds secured by said mortgage or trust deed, as provided by the statute, in which case the said marshal shall state the facts in his report of sale.

And it is further ordered, adjudged, and decreed, that the defendants, and all persons claiming or to claim from or under them, and all persons having a lien subsequent to such mortgage, by judgment or decree, upon the premises and property contained in said mort-
gage or trust deed, and his or their heirs, assigns, and per-
71 sonal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and

their heirs and personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof, save and except that this decree and said sale under this decree shall not in any manner affect or impair the right or title which the said defendants, Stewart, Allerding, Hahm, and Wootsch, or either of them, may now have to land upon which said railroad company has located its way, and for which no compensation has been made to them.

And it is further ordered that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties in this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on production of the marshal's deed of such premises, and a certified copy of the order of this court confirming the report of such sale, after such order has become absolute.

72 And it is further ordered that it be referred to a master of this court to take an account of the outstanding bonds of said railroad company defendant, secured by said trust-deed or mortgage, and which are a lien on said mortgaged premises, and of the number and holders of said bonds, of the amount due thereon for interest and principal; of the number and amount of said bonds which are pledged or held as collateral security for debts or obligations of said railroad company, and the amount of principal and interest due upon the debts or obligations for which such bonds are so pledged or held as security; that the master, in taking such account, examine any of the holders of such bonds, any of the parties to this suit, and any witnesses that may be produced by any party interested in said company defendant as a stockholder or creditor thereof, or in said mortgage or trust deed; that notice of the time and place of such examination by and before the master be given, at least three weeks before such examination, by publishing such notice at least once a week, for said term of three weeks, in at least one newspaper published in the city of Milwaukee, and one newspaper published in the city of New York, and by serving a copy of such notice, personally, upon each and every holder of such bonds who may be

73 known to the complainant's solicitors, or whose names can be ascertained; and that all persons holding, or claiming to hold, any of said mortgage bonds, either as purchaser thereof in good faith, or as collateral security, have leave to appear before said master, and be heard upon the matter of such account and examination, and that the master report such examination, and a statement of the account aforesaid, to this court before the day of sale of said mortgaged premises under this decree.

A. G. MILLER.

Decree signed, recorded, and enrolled, March 19, A. D. 1859.
J. M. MILLER, *Clerk*.

AUGUST 1, 1859.

This day came Winfield Smith, the master in this cause, and filed his first report, as follows, to wit:

District Court of the United States for the District of Wisconsin.

Master's 1st report.

THE FARMERS' LOAN and TRUST COMPANY
v.
THE MILWAUKEE AND SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahn, & Gottfried Wootsch. } In equity.

To the Hon. A. G. Miller, judge:

In pursuance and by virtue of a decretal order of this court, made in this cause on the nineteenth day of March A. D. 1859 in and by which it was ordered, among other things, that it be referred
74 to a master of this court to take an account of the outstanding bonds of said railroad company, defendant, to examine the holders of such bonds, and witnesses, and to report such examination, and a statement of such account to this court before the day of sale of the mortgaged premises described in said decree, I, the undersigned, one of the masters of this court, do respectfully report and certify, that having been charged by the complainant's solicitors with the execution of the said order of reference, I appointed the sixth day of June, A. D. 1859, at 11 o'clock in the forenoon, at my office, in the city of Milwaukee, in the State of Wisconsin, and upon such other subsequent days as such proceedings might be adjourned to, for taking such examination and account, and for proceeding in the other matters specified in the said order of reference; that I gave notice of such time and place, by publishing the same once a week, for three successive weeks, commencing before the first day of May, A. D. 1859, in the Milwaukee Daily News, a newspaper published in the city of Milwaukee, and in the New York Commercial Advertiser, a newspaper published in the city of New York, as appears by the affidavits of such publication to be filed; that at the time and place named in the said notice I was attended by the
75 counsel for the complainant, by the counsel for the defendant, the Milwaukee and Superior Railroad Company, and by counsel for the bondholders hereinafter named.

That the counsel for James B. Cross produced in evidence on the part of said Cross three hundred twenty-two bonds of said defendant railroad company, of one thousand dollars each dated on the first day of January, A. D. 1857, with semi-annual interest coupons attached thereto, by which it appears that interest at the rate of eight per cent. is payable upon said bonds on the first days of January and July in each year, and that interest is due on each of said bonds to the amount of four instalments of forty dollars each, except

their heirs and personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof, save and except that this decree and said sale under this decree shall not in any manner affect or impair the right or title which the said defendants, Stewart, Allerding, Hahm, and Wootsch, or either of them, may now have to land upon which said railroad company has located its way, and for which no compensation has been made to them.

And it is further ordered that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties in this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on production of the marshal's deed of such premises, and a certified copy of the order of this court confirming the report of such sale, after such order has become absolute.

72 And it is further ordered that it be referred to a master of this court to take an account of the outstanding bonds of said railroad company defendant, secured by said trust-deed or mortgage, and which are a lien on said mortgaged premises, and of the number and holders of said bonds, of the amount due thereon for interest and principal; of the number and amount of said bonds which are pledged or held as collateral security for debts or obligations of said railroad company, and the amount of principal and interest due upon the debts or obligations for which such bonds are so pledged or held as security; that the master, in taking such account, examine any of the holders of such bonds, any of the parties to this suit, and any witnesses that may be produced by any party interested in said company defendant as a stockholder or creditor thereof, or in said mortgage or trust deed; that notice of the time and place of such examination by and before the master be given, at least three weeks before such examination, by publishing such notice at least once a week, for said term of three weeks, in at least one newspaper published in the city of Milwaukee, and one newspaper published in the city of New York, and by serving a copy of such notice, personally, upon each and every holder of such bonds who may be

73 known to the complainant's solicitors, or whose names can be ascertained; and that all persons holding, or claiming to hold, any of said mortgage bonds, either as purchaser thereof in good faith, or as collateral security, have leave to appear before said master, and be heard upon the matter of such account and examination, and that the master report such examination, and a statement of the account aforesaid, to this court before the day of sale of said mortgaged premises under this decree.

A. G. MILLER.

Decree signed, recorded, and enrolled, March 19, A. D. 1859.
J. M. MILLER, *Clerk*.

AUGUST 1, 1859.

This day came Winfield Smith, the master in this cause, and filed his first report, as follows, to wit:

District Court of the United States for the District of Wisconsin.

Master's 1st report.

THE FARMERS' LOAN and TRUST COMPANY
v.
THE MILWAUKEE AND SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahn, & Gottfried Wootsch. } In equity.

To the Hon. A. G. Miller, judge:

In pursuance and by virtue of a decretal order of this court, made in this cause on the nineteenth day of March A. D. 1859 in and by which it was ordered, among other things, that it be referred
74 to a master of this court to take an account of the outstanding bonds of said railroad company, defendant, to examine the holders of such bonds, and witnesses, and to report such examination, and a statement of such account to this court before the day of sale of the mortgaged premises described in said decree, I, the undersigned, one of the masters of this court, do respectfully report and certify, that having been charged by the complainant's solicitors with the execution of the said order of reference, I appointed the sixth day of June, A. D. 1859, at 11 o'clock in the forenoon, at my office, in the city of Milwaukee, in the State of Wisconsin, and upon such other subsequent days as such proceedings might be adjourned to, for taking such examination and account, and for proceeding in the other matters specified in the said order of reference; that I gave notice of such time and place, by publishing the same once a week, for three successive weeks, commencing before the first day of May, A. D. 1859, in the Milwaukee Daily News, a newspaper published in the city of Milwaukee, and in the New York Commercial Advertiser, a newspaper published in the city of New York, as appears by the affidavits of such publication to be filed; that at the time and place named in the said notice I was attended by the
75 counsel for the complainant, by the counsel for the defendant, the Milwaukee and Superior Railroad Company, and by counsel for the bondholders hereinafter named.

That the counsel for James B. Cross produced in evidence on the part of said Cross three hundred twenty-two bonds of said defendant railroad company, of one thousand dollars each dated on the first day of January, A. D. 1857, with semi-annual interest coupons attached thereto, by which it appears that interest at the rate of eight per cent. is payable upon said bonds on the first days of January and July in each year, and that interest is due on each of said bonds to the amount of four instalments of forty dollars each, except

their heirs and personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof, save and except that this decree and said sale under this decree shall not in any manner affect or impair the right or title which the said defendants, Stewart, Allerding, Hahm, and Wootsch, or either of them, may now have to land upon which said railroad company has located its way, and for which no compensation has been made to them.

And it is further ordered that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties in this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on production of the marshal's deed of such premises, and a certified copy of the order of this court confirming the report of such sale, after such order has become absolute.

72 And it is further ordered that it be referred to a master of this court to take an account of the outstanding bonds of said railroad company defendant, secured by said trust-deed or mortgage, and which are a lien on said mortgaged premises, and of the number and holders of said bonds, of the amount due thereon for interest and principal; of the number and amount of said bonds which are pledged or held as collateral security for debts or obligations of said railroad company, and the amount of principal and interest due upon the debts or obligations for which such bonds are so pledged or held as security; that the master, in taking such account, examine any of the holders of such bonds, any of the parties to this suit, and any witnesses that may be produced by any party interested in said company defendant as a stockholder or creditor thereof, or in said mortgage or trust deed; that notice of the time and place of such examination by and before the master be given, at least three weeks before such examination, by publishing such notice at least once a week, for said term of three weeks, in at least one newspaper published in the city of Milwaukee, and one newspaper published in the city of New York, and by serving a copy of such notice, personally, upon each and every holder of such bonds who may be

73 known to the complainant's solicitors, or whose names can be ascertained; and that all persons holding, or claiming to hold, any of said mortgage bonds, either as purchaser thereof in good faith, or as collateral security, have leave to appear before said master, and be heard upon the matter of such account and examination, and that the master report such examination, and a statement of the account aforesaid, to this court before the day of sale of said mortgaged premises under this decree.

A. G. MILLER.

Decree signed, recorded and enrolled, March 19, A. D. 1859.
J. M. MILLER, *Clerk*.

AUGUST 1, 1859.

This day came Winfield Smith, the master in this cause, and filed his first report, as follows, to wit:

District Court of the United States for the District of Wisconsin.

Master's 1st report.

THE FARMERS' LOAN and TRUST COMPANY
v.
THE MILWAUKEE AND SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahn, & Gottfried Wootsch. } In equity.

To the Hon. A. G. Miller, judge:

In pursuance and by virtue of a decretal order of this court, made in this cause on the nineteenth day of March A. D. 1859 in and by which it was ordered, among other things, that it be referred
74 to a master of this court to take an account of the outstanding bonds of said railroad company, defendant, to examine the holders of such bonds, and witnesses, and to report such examination, and a statement of such account to this court before the day of sale of the mortgaged premises described in said decree, I, the undersigned, one of the masters of this court, do respectfully report and certify, that having been charged by the complainant's solicitors with the execution of the said order of reference, I appointed the sixth day of June, A. D. 1859, at 11 o'clock in the forenoon, at my office, in the city of Milwaukee, in the State of Wisconsin, and upon such other subsequent days as such proceedings might be adjourned to, for taking such examination and account, and for proceeding in the other matters specified in the said order of reference; that I gave notice of such time and place, by publishing the same once a week, for three successive weeks, commencing before the first day of May, A. D. 1859, in the Milwaukee Daily News, a newspaper published in the city of Milwaukee, and in the New York Commercial Advertiser, a newspaper published in the city of New York, as appears by the affidavits of such publication to be filed; that at the time and place named in the said notice I was attended by the
75 counsel for the complainant, by the counsel for the defendant, the Milwaukee and Superior Railroad Company, and by counsel for the bondholders hereinafter named.

That the counsel for James B. Cross produced in evidence on the part of said Cross three hundred twenty-two bonds of said defendant railroad company, of one thousand dollars each dated on the first day of January, A. D. 1857, with semi-annual interest coupons attached thereto, by which it appears that interest at the rate of eight per cent. is payable upon said bonds on the first days of January and July in each year, and that interest is due on each of said bonds to the amount of four instalments of forty dollars each, except

their heirs and personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof, save and except that this decree and said sale under this decree shall not in any manner affect or impair the right or title which the said defendants, Stewart, Allerding, Hahm, and Wootsch, or either of them, may now have to land upon which said railroad company has located its way, and for which no compensation has been made to them.

And it is further ordered that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties in this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on production of the marshal's deed of such premises, and a certified copy of the order of this court confirming the report of such sale, after such order has become absolute.

72 And it is further ordered that it be referred to a master of this court to take an account of the outstanding bonds of said railroad company defendant, secured by said trust-deed or mortgage, and which are a lien on said mortgaged premises, and of the number and holders of said bonds, of the amount due thereon for interest and principal; of the number and amount of said bonds which are pledged or held as collateral security for debts or obligations of said railroad company, and the amount of principal and interest due upon the debts or obligations for which such bonds are so pledged or held as security; that the master, in taking such account, examine any of the holders of such bonds, any of the parties to this suit, and any witnesses that may be produced by any party interested in said company defendant as a stockholder or creditor thereof, or in said mortgage or trust deed; that notice of the time and place of such examination by and before the master be given, at least three weeks before such examination, by publishing such notice at least once a week, for said term of three weeks, in at least one newspaper published in the city of Milwaukee, and one newspaper published in the city of New York, and by serving a copy of such notice, personally, upon each and every holder of such bonds who may be

73 known to the complainant's solicitors, or whose names can be ascertained; and that all persons holding or claiming to hold, any of said mortgage bonds, either as purchaser thereof in good faith, or as collateral security, have leave to appear before said master, and be heard upon the matter of such account and examination, and that the master report such examination, and a statement of the account aforesaid, to this court before the day of sale of said mortgaged premises under this decree.

A. G. MILLER.

Decree signed, recorded, and enrolled, March 19, A. D. 1859.
J. M. MILLER, *Clerk*.

AUGUST 1, 1859.

This day came Winfield Smith, the master in this cause, and filed his first report, as follows, to wit:

District Court of the United States for the District of Wisconsin.

Master's 1st report.

THE FARMERS' LOAN and TRUST COMPANY
v.
THE MILWAUKEE AND SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahn, & Gottfried Wootsch. } In equity.

To the Hon. A. G. Miller, judge:

In pursuance and by virtue of a decretal order of this court, made in this cause on the nineteenth day of March A. D. 1859 in and by which it was ordered, among other things, that it be referred
74 to a master of this court to take an account of the outstanding bonds of said railroad company, defendant, to examine the holders of such bonds, and witnesses, and to report such examination, and a statement of such account to this court before the day of sale of the mortgaged premises described in said decree, I, the undersigned, one of the masters of this court, do respectfully report and certify, that having been charged by the complainant's solicitors with the execution of the said order of reference, I appointed the sixth day of June, A. D. 1859, at 11 o'clock in the forenoon, at my office, in the city of Milwaukee, in the State of Wisconsin, and upon such other subsequent days as such proceedings might be adjourned to, for taking such examination and account, and for proceeding in the other matters specified in the said order of reference; that I gave notice of such time and place, by publishing the same once a week, for three successive weeks, commencing before the first day of May, A. D. 1859, in the Milwaukee Daily News, a newspaper published in the city of Milwaukee, and in the New York Commercial Advertiser, a newspaper published in the city of New York, as appears by the affidavits of such publication to be filed; that at the time and place named in the said notice I was attended by the
75 counsel for the complainant, by the counsel for the defendant, the Milwaukee and Superior Railroad Company, and by counsel for the bondholders hereinafter named.

That the counsel for James B. Cross produced in evidence on the part of said Cross three hundred twenty-two bonds of said defendant railroad company, of one thousand dollars each dated on the first day of January, A. D. 1857, with semi-annual interest coupons attached thereto, by which it appears that interest at the rate of eight per cent. is payable upon said bonds on the first days of January and July in each year, and that interest is due on each of said bonds to the amount of four instalments of forty dollars each, except

upon two of them, on which only three instalments are due; the principal secured being due twenty years from the date of said bonds.

That the counsel for Orson Fuller produced in evidence on the part of said Fuller fifty bonds of the same date, tenor, and amount as above, by the coupons upon which it appears that three semi-annual instalments, as above, were due upon each.

That the counsel for Silas H. Buttrick produced in evidence on the part of said Buttrick forty-nine bonds of the same date,
76 tenor and amount as above, by the coupons upon which it appears that interest is due thereupon to the same amount as upon those last above named.

It being understood that additional testimony was to be produced, the examination has by counsel been continued from day to day until this date, and is not yet concluded; so that I am as yet unable to make a final report in conformity to the order of this court.

All which is respectfully submitted.

Dated this first day of August, 1859.

WINFIELD SMITH,
Master in Chancery.

And afterwards, to wit, at a special term of said court, begun and held at the city of Milwaukee, on the first Monday of August, A. D. 1859, and on the second day thereof, to wit, on the second day of August, A. D. 1859, the following proceedings were had, to wit:

THE FARMERS' LOAN and TRUST COMPANY
v.
THE MILWAUKEE & SUPERIOR RAILROAD Company, The City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm, & Gottfried Wootsch. } In equity.

This day came Winfield Smith, a master to whom it was re-
77 ferred by a decree of this court to take an account of the outstanding bonds of said railroad company, defendant, to examine the holders of said bonds as witnesses, and to report such examination and a statement of said account, made a partial report.

Whereupon, and on motion of the counsel of James B. Cross, and other bond holders, it is ordered by the court that the marshal open the sale, in pursuance of the decree, at the time and place mentioned in the advertisement and notice, and that he adjourn said sale at said time and place, by giving notice aloud to the bidders and persons there, until Saturday, the twenty-seventh day of August, instant, at ten o'clock in the forenoon of said day, at the same place, and that he make report of his proceeding under this order in his report of sale.

OCTOBER 10, 1859.

This day came the marshal and made report of sale, as follows:

In the District Court of the United States for the District of Wisconsin.

78 *Marshal's report of sale.*

THE FARMERS' LOAN & TRUST COMPANY
vs.
THE MILWAUKEE and SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm, & Gottfried Wootsh. } In equity.

I, Major J. Thomas, marshal for the district of Wisconsin, hereby report, that in pursuance and by virtue of a decree made by the District Court of the United States for the district of Wisconsin, on the third day of January, A. D. 1859, in the above-entitled cause, as directed in said decree, I gave notice of the time and place of sale by publication for a period of ninety days prior to such sale in the Milwaukee News, a daily paper published in the city and county of Milwaukee, in this district, and in the New York Commercial Advertiser a daily paper published in the city of New York, (printed copies of said notice and the affidavits of publication are annexed and referred to as a part of this report,) and I did at the time and place mentioned in said printed notices, to wit, on the second day of August, 1859, at three o'clock in the afternoon, from the steps of the custom-house in the city of Milwaukee, open the said sale, and offer the premises described in said decree for sale, but received no bids therefor, and at the said time and place, by the direction of the
79 solicitors for the complainant, I held the said sale open until the day following, to wit, the third day of August, 18 9, at the same hour and place; and on the third day of August, 1859, at the time and place named by me, I again gave public notice to all persons present that said sale would be held open until the day following, to wit, the fourth day of August, 1859, at the same hour and place; and on the said fourth day of August, 1859, at the time and place named by me I did, in obedience to the order of this court of which a certified copy is hereto annexed, give public and verbal notice that said sale was adjourned until Saturday, the 27th day of August, 1859, at ten o'clock in the forenoon, at the same place, and on the said adjourned day of sale, to wit, on the twenty-seventh day of August, 1859, at ten o'clock in the forenoon, from the steps of the custom-house, in the city of Milwaukee, in this district, I offered for sale and sold at public auction the premises described in said decree as follows to wit: "All the following present and in future to be acquired real and personal property and estate of said defendant, the Milwaukee and Superior Railroad Company, that is to say, all the first division of the railroad of said railroad company, defend-
80 ant, from the city of Milwaukee to the city of Green Bay, in said State of Wisconsin, a distance of one hundred and twenty

miles, including the right-of-way and land occupied by said first division of said road, (subject to the right, title or claim which the said defendants, Stewart, Allerding, Hahm, and Wootsch, or either of them, may have had at the time of making said decree to land upon which said railroad company has located its way, and for which no compensation has been made to them,) together with the superstructure and track thereon, and all rails and other materials used thereon, bridges, viaducts, culverts, fences, equipments, necessary depot grounds and buildings thereon, belonging to the said railroad company, and all rolling stock, engines, tenders, cars, tools, materials, machinery, fixtures, and all other personal property appertaining to said first division of said road, and all rights thereto, and interest to be acquired by said defendant, the Milwaukee and Superior Railroad Company, together with the name and functions appertaining to the said first division of said road, all tolls, rents and income to be had or levied therefrom, and all corporate and other franchises, rights
81 and privileges of the said railroad company, in and to or concerning the same," which were bid off by James B. Cross for the sum of twenty thousand one hundred dollars, ($20,100,) he being the highest and best bidder, and that being the highest and best bid made for the premises described.

M. J. THOMAS, *Marshal.*

Statement.

Proceeds of sale		$20,100 00
Costs taxed to marshal	17 90	
Costs of sale; printer's fees, Daily News	159 00	
Com'l Adv'r	134 43	
Drawing adv'ts	2 00	
Making sale	10 00	
Report	3 00	
		326 33
Balance		19,773 67

Affidavit of publication.

STATE OF WISCONSIN, *Milwaukee County*:

Joseph Lathrop being duly affirmed, says, that he is one of the publishers of the "Milwaukee News," a newspaper in the city of Milwaukee, in said county; that a notice, of which the annexed is a true copy, was duly published in such newspaper from Ap'l 21st to August, daily, commencing on the 21 day of April, A. D.
82 1859, and ending on the 2d day of August, A. D. 1859.

JOSEPH LATHROP.

Subscribed and affirmed to this 7 day of Sept., A. D. 1859, before me.

P. V. DEUSTEO,
Notary Public, Mil. Co., Wis.

In the U. S. District Court for the district of Winconsin.

Notice.—United States Marshal's sale.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm, and Gottfried Wootsch. } In equity.

In pursuance and by virtue of a decree made by the District Court of the United States for the district of Wisconsin, on the nineteenth day of March, 1859, in the above-entitled cause, I shall sell at public auction, on Tuesday, 2nd day of August, 1859, at 3 o'clock in the afternoon, from the steps of the custom-house in the city of Milwaukee, all and singular the mortgaged premises mentioned in the bill of complaint in said cause, and described as: "All the following present and future to be acquired real and personal property and real estate of the said defendant, the Milwaukee and Superior Railroad Company, that is to say, all of the first division of the railroad
83 of said railroad company, defendant, from the city of Milwaukee to the city of Green Bay, in said State of Wisconsin, a distance of one hundred and twenty miles, including the right of way and land occupied by said first division of said road, (subject to the right, title, or claim which the said defendants, Stewart, Allerding, Hahm, and Wootsch, or either of them, may have had at the time of making said decree, to land upon which said Railroad Company has located its way, and for which no compensation has been made to them,) together with the superstructure and track thereon, and all rails and other materials used thereon, bridges, viaducts, culverts, fences, equipments, necessary depot grounds and buildings thereon, belonging to the said railroad company, and all rolling stock, engines, tenders, cars, tools, materials, machinery, fixtures, and all other personal property appertaining to said first division of said road, and all rights thereto, and interests to be acquired by said defendant, the Milwaukee and Superior Railroad Company, together with the name and functions appertaining to the said first division of said road, all tolls, rents, and income to be had or levied therefrom, and all corporate and other franchises, rights, and privileges of the said railroad company in or to or concerning the same."

84 Marshal's office, Milwaukee, Wis., April 6, 1859.

M. J. THOMAS,
United States Marshal District of Wisconsin.

EMMONS, VAN DYKE & HAMILTON,
Compl't's Solicitors.

Affidavit of publication.

CITY AND COUNTY OF NEW YORK, *ss*:

Henry J. Boulware, of the city of New York, being duly sworn, says that he is a foreman in the office of the New York Commercial Advertiser, a daily paper printed and published in the city of New York, and that the notice, of which the annexed is a printed copy, has been regularly published in the said New York Commercial Advertiser for three months successively commencing on the 30th day of April, 1859.

HENRY J. BOULWARE.

Sworn before me this 2d day of August, 1859.

R. E. STILWELL,
U. S. Commissioner.

In the U. S. District Court for the District of Wisconsin.

Notice.—United States Marshal's sale.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm and Gottfried Wootsch. } In equity.

In pursuance and by virtue of a decree made by the District
85 of the United States for the district of Wisconsin, on the nineteenth day of March, 1859, in the above entitled cause, I shall sell at public auction, on Tuesday, 2nd day of August, 1859, at 3 o'clock in the afternoon, from the steps of the custom house, in the city of Milwaukee, all and singular the mortgaged premises mentioned in the bill of complaint in said cause, and described as: "All the following present and in future to be acquired real and personal property and real estate of the said defendant, The Milwaukee and Superior Railroad Company, that is to say, all of the first division of the railroad of said railroad company, defendant, from the city of Milwaukee to the city of Green Bay, in said State of Wisconsin, a distance of one hundred and twenty miles, including the right-of-way and land occupied by said first division of said road, (subject to the right, title, or claim which the said defendants, Stewart, Allerding Hahm, and Wootsch, or either of them, may have had at the time of making said decree to land upon which said railroad company has located its way and for which no compensation has been made to them,) together with the superstructure and track thereon, and all
rails and other material used thereon, bridges, viaducts, cul-
86 verts, fences, equipments, necessary depot grounds and buildings thereon belonging to the said railroad company, and all rolling stock, engines, tenders, cars, tools, materials, machinery,

fixtures, and all other personal property appertaining to said first division of said road, and all rights thereto and interests to be acquired by said defendant, The Milwaukee and Superior Railroad Company, together with the name and functions appertaining to the said first division of said road, all tolls, rents, and income to be had or levied therefrom, and all corporate and other franchises, rights, and privileges of the said railroad company in, or to, or concerning the same."

Marshal's office, Milwaukee, Wis., April 6, 1859.

M. J. THOMAS.
United States Marshal District of Wisconsin.
EMMONS, VAN DYKE & HAMITON.
Compl't's solicitors.

UNITED STATES OF AMERICA, *Southern District of New York, ss*:

I, Kenneth G. White, clerk of the Circuit Court of the United States of America for the southern district of New York, second circuit, do hereby certify that I am well acquainted with the handwriting of R. E. Stilwell whose name is subscribed to the an-
87 nexed affidavit, and that the signature to the same is in his proper handwriting; and I do further certify that he was at the time of signing the same a United States commissioner duly appointed by the Circuit Court of the United States of America for the southern district of New York, second circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Circuit Court this second day of August, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of these United States the eighty-fourth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

Order of confirmation.

Whereupon it is ordered by the court that the said sale be and hereby is confirmed.

And same day, (Ocotber 10, 1859,) came Winfield Smith, esq., the master in this cause and filed his final report as follows, to wit:

88 District Court of the United States for the District of Wisconsin.

THE FARMERS' LOAN AND TRUST COMPANY *vs.* THE MILWAUKEE AND SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahn and Gottfried Wootsch. } In equity.

To the Hon. A. G. Miller, judge:

In pursuance and by virtue of a decretal order of this court made in this cause on the nineteenth day of March, A. D. 1859, in and by

which it was ordered, among other things, that it be referred to a master of this court to take an account of the outstanding bonds of said railroad company, defendant, specified in the said decretal order, and of the number and holders of the said bonds, of the amount
89 due thereon for interest and principal, of the number and amount of said bonds which are pledged or held as collateral security for debts or obligations of said railroad company, and the amount of principal and interest due upon the debts or obligations for which such bonds are so pledged or held as security; that the master in taking such account examine any of the holders of such bonds, any of the parties to this suit, and any witnesses that may be produced by any party interested in said company, defendant, as a stockholder or creditor thereof, or in the said mortgage or trust deed mentioned in said order, and that such master report such examination and a statement of such account to this court.

I, the undersigned, one of the masters of this court, in addition to the report by me heretofore made and filed, do further respectfully report and certify.

90 That since the filing of the said first report the counsel therein named have appeared before me, and the counsel for Orson Fuller, and Silas H. Buttrick, named in said report, have withdrawn the bonds and coupons therein stated to have been offered and produced in evidence by them respectively, and have withdrawn all claim upon such bonds or coupons.

That the counsel for the said James B. Cross, mentioned in said first report, have, since the filing thereof, produced in evidence upon the part of the said Cross, all of the bonds and coupons above-mentioned as having been produced and afterwards withdrawn by the said Orson Fuller and Silas H. Buttrick, being ninety-nine of the bonds specified in the said decretal order, and numbered 141 to 164, both inclusive and 166 to 240, both inclusive. The bond numbered
91 165 was also produced in evidence on the part of the said Cross by his counsel, being similar in form, mode of execution, and all other respects, except that it was not signed by the secretary of the said railroad company nor by any person for him, for which reason I have rejected the same.

The coupons attached to the said bond, being likewise undersigned, were also rejected.

The deposition of Joshua Stark has been taken by me on the part of the defendant, The City of Milwaukee, which defendant has likewise given in evidence certain other papers, all of which, together with the said deposition, are returned herewith. The said city by its counsel, H. L. Palmer, has also produced in evidence one hundred and twenty-eight bonds of those specified in the decretal order, of which bonds (one hundred) numbered 1 to 100, both inclusive, are accompanied by forty coupons of forty dollars each for semi-
92 annual interest, of which five are due upon each of said bonds and fifteen are not due, the first falling due upon the 1st January, 1860. The principal sum falls due upon the same day with the last of said coupons, being on the first day of January,

1877. The said city has also produced in evidence twenty-eight of the bonds specified in the said decretal order, numbered 241 to 268, both inclusive, similar in all respects to the others mentioned, and accompanied with like coupons to the number of eighteen on each bond, the first two, being for the first year's interest on each bond, having been cut off.

No other evidence has been offered to me, except that the original record of the proceedings of the board of directors of the said railroad company was produced before me; the examination of
93 Mr. James B. Cross has been taken on his own behalf before me, and is returned herewith and annexed hereto; the admission hereto attached and certified by me was also made before me by the counsel aforesaid.

I have found and ascertained, and I do hereby report that the outstanding bonds of the said railroad company, defendant, secured by said trust deed or mortgage, and which were on the date of the said decretal order, to wit, on the nineteenth day of March, A. D. 1859, a lien upon the said mortgaged premises, were as follows:

1. One hundred and twenty-eight of said bonds then held by the defendant the city of Milwaukee, numbered from 141 to 268 both inclusive, for $128,000. The interest then due on which was—On 100 bonds, two years' interest at eight per cent., being $16,000. On 28 bonds, one years' interest, at eight per cent., being $2.240. The interest which fell due thereon on the first day of July last,
94 was four per cent. upon the whole, being $5,120. The interest to the date of this report thereon is since 1 July, 1859, $2,844 44. The whole sum being $154,204 44.

2. Forty-two bonds then held by J. Boorman, Johnston & Co., numbered 101 to 140, both inclusive, and 269 and 270 for $42,000. The interest then due on which was on 40 bonds interest at eight per cent. for one year and a half, and on two bonds at the same rate for one year $4,960. The interest which fell due thereon on the first day of July last was $1,680. The interest since then to the date of this report is $933 33; the whole sum being $49,573 33.

I further report that the bonds so as aforesaid held by the said city were pledged to the said city, and by it held as collateral, to secure the performance of the conditions of a bond theretofore executed to the said city by Conda R. Alton and others, which conditions are as follows, to wit, that the proceeds of certain bonds of said city issued to said railroad company (and hereinafter more
95 fully described) should be faithfully expended in the construction and equipment of that portion of the railroad of said company between the city of Milwaukee and a point twenty miles northward of the junction of said railroad with the La Crosse and Milwaukee railroad; that the obligors in said bond to said city should construct, equip, and complete said railroad of the railroad company, defendant, in good running order from the junction thereof with the La Crosse and Milwaukee Railroad, northward, a distance of not less than twenty miles, by the first day of July, 1858, and should protect and save harmless the said city against the payment of the in-

terest or principal of the said bonds issued to the said railroad company till the said first twenty miles of its said railroad should be completed, fully equipped, and in good running order.

The bonds of the said city above mentioned were duly exe-
96 cuted and delivered to the said railroad company in the year 1857, and are conditioned for the payment of one hundred thousand dollars, principal, in twenty years from the date thereof, together with interest, payable semi-annually, at the rate of seven per cent. per annum, at the Union Bank of New York in the city of New York.

I further report that the conditions of the bond so executed to the said city have been broken; and that the obligors therein have entirely failed to construct, equip, or complete the railroad of the railroad company, defendant, from the junction thereof with the La Crosse and Milwaukee railroad northward, a distance of not less than twenty miles; and they have failed to protect and save harmless the said city against the payment of the interest or principal of the said bonds issued by the said city. The said railroad company failed to pay any of the interest due on the last-mentioned bonds upon
97 the first day of January, A. D. 1858, and also failed to pay any interest which has become due since that date upon the said bonds, or any part of the principal or interest to become due thereupon. The said railroad company is utterly insolvent.

I further report that the bonds, so as aforesaid held by J. Boorman, Johnston & Co., were pledged to them, and by them held as collateral to secure the payment of a sum of money due to them from the said railroad company, the exact amount of which is not clearly established by the evidence, but is estimated by me at twenty-one thousand dollars.

Those forty-two bonds have been, together with the said indebtedness which they secured, transferred to James B. Cross, above named, and they have been, since the date of the said decretal order, offered by him for sale, in pursuance of the power of sale conferred by the said railroad company; and having been bid in by
98 himself, the said forty-two bonds have thus become the absolute property of the said James B. Cross.

I further report that the said 280 bonds, numbered from 271 to 550, inclusive, were issued to the said J. Boorman, Johnston & Co., as further collateral security to the indebtedness to them of the said railroad company, about or soon after the date of the said decretal order, in pursuance of a resolution of the board of directors of the said railroad company passed on the third day of March, 1859. They were also transferred with that indebtedness to the said James B. Cross, and, being sold with the others so transferred, likewise became his absolute property since the date of the said decretal order.

The said 280 bonds are a lien in favor of the said James B. Cross, to the full amount thereof as against the said railroad company, defendant.

99	The principal sum agreed to be paid thereby, is	$280,000
	The interest thereon, at eight per cent. per annum, computed up to and including the date hereof, is	50,022 22
	The whole being	$330,022 22

I have not ascertained that the said bonds had been issued, or that any sum was due thereon at the date of the said decretal order.

I further report that the 100 bonds in the hands of James B. Cross, as hereinabove stated, numbered 141 to 290, inclusive, have never been issued by authority of the railroad company, defendant; have not been in the possession of bona fide holders thereof who have paid a valuable consideration therefor; and are void, both as against the said railroad company and its creditors.

I further report that there are no other outstanding bonds of the said railroad company, defendant, secured by the said trust deed or mortgage, and which are a lien upon the said mortgaged
100 premises, than the bonds hereinabove described.

Upon such of those bonds as were liens upon said mortgaged premises, at the date of said decretal order, I report the principal sum and the interest to the date of this report, to be due to the holders thereof, as follows:

To the city of Milwaukee, the sum of one hundred and fifty-four thousand two hundred and four dollars and forty-four cents	$154,204 44
To James B. Cross, the sum of forty nine thousand five hundred and seventy-three dollars and thirty-three cents	$ 49,573 33
The whole being	203,777 77

(Two hundred three thousand seven hundred seventy-seven dollars and seventy-seven cents.)

Respectfully submitted.

Dated this 10th day of October, 1859.

WINFIELD SMITH, *Master, &c.*

101 District Court of the United States for the district of Wisconsin.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD Company, city of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahn, and Gottfried Wootsch. } In chancery.

Depositions of witnesses, taken before Winfield Smith, one of the masters of this court, at his office in the city of Milwaukee, in the said district, by virtue and in pursuance of a decretal order of reference made in this cause on the nineteenth day of March, A. D. 1859.

THURSDAY, 18*th August*, 1859.

Present, E. L. Buttrick, of counsel for James B. Cross, one of the bondholders; Nelson C. Gridley, of counsel for Silas S. Buttrick, and Orson Fuller; Henry L. Palmer, of counsel for the city of Milwaukee, defendant.

102 Joshua Stark, a witness produced and sworn on behalf of said city, testifies and says:

I know the Milwaukee and Superior Railroad Company, defendant in this suit. I have been a director in that company since 1856, since April of that year I think. That was the time of the first election of officers by the stockholders. I have been its attorney since the same time; I have been familiar with its transactions. The business of the company was transacted by a board of directors. There was an executive committee clothed with ample powers. The president was employed in the business of the company nearly all the time from the organization of the company down to the fall of 1857. When the company has first organized he had, by virtue of a resolution, general powers to make contracts and to do pretty much all business, until April, 1857, when that power was taken from
103 him, and given exclusively to the executive committee. I am quite confident it was in April, though it may have been in May.

The first mortgage was executed in the winter of 1856, '7. The first mortgage covered the road from Milwaukee to Green Bay, supposed to be 120 miles; it was made to secure a proposed issue of twelve hundred bonds of a thousand dollars each. The company executed five hundred and fifty bonds of that issue. They were not issued until some time in the spring. The company provided for using 100 of them, numbered from one to one hundred inclusive, by giving them to the city of Milwaukee as collateral security to the city for the loan of city bonds. The remainder of that issue, or so many of them as were needed for that purpose, were in the spring and summer of 1857, deposited with C. B. Raymond & Co.,
104 in the city of New York as collateral security to the com-

pany's notes given for railroad iron purchased from them as agents of a Liverpool house, under a contract made in December, 1856, by which the company agreed to purchase some four thousand tons of iron, I believe, on credit, giving its notes and hypothecating the first mortgage bonds at fifty cents on a dollar to secure those notes. During the summer of 1857, the company received, I think, between thirteen and fourteen hundred tons of iron under this contract, for which it gave its notes, to the amount of about sixty thousand dollars, I think a little more than that sum, and it hypothecated its first mortgage bonds to double that amount, about $120,000.

There was no other use or disposition made of any of the bonds by authority of the company, at least before April, 1858. The balance of the bonds remained, I understood, in the custody of the
105 company, or of M. K. Jessup & Co., until that time. In September, or in October, or November, 1857, an arrangement was entered into between the company and C. B. Raymond & Company, by which the railroad company reconveyed to Raymond & Co., the railroad iron it had received and not used, amounting to about nine hundred tons or a little over; and Raymond & Co. surrendered to the railroad company its notes given for the iron reconveyed, and the first mortgage bonds helds as collateral to those notes, the bonds surrendered, amounting to about eighty thousand dollars, I think. These comprised a portion of those bonds, numbered from 141 to 240.

The bonds hypothecated were taken out from these numbered from 101 to 270 inclusive.

The company authorized no other sale or hypothecation of its bonds before April, 1858, than as I have mentioned, unless
106 by a resolution of the board of directors of September 21, 1857.

The hyyothecation for the iron was made from time to time as the iron was received, and all after the twentieth day of April, 1857. The president, Mr. Alton, had then no authority whatever to dispose of or hypothecate bonds; his authority was taken away, I think, on the 12th of April. I have a copy of the resolution rescinding Mr. Alton's authority to act for the company. I believe I have not a copy of it here.

No disposition was ever made of the bonds of the company, numbered 141 to 240 inclusive, by the company, except as I have stated, to the best of my knowledge. Those bonds were cancelled by a resolution of the company. I have here the original records of the company.

The resolution taking away the president's authority was passed 8 April, 1857, before any of the bonds were used by the com-
107 pany; in fact before any of them were countersigned, except those 100 bonds deposited with the city. It is in the following language:

Resolved, That the powers and authority conferred upon the president of this company by resolution of the 2nd of May, 1856, be

and are hereby transferred to the executive committee, to be exercised by them and their delegated agent alone after this date.

This resolution was passed by the board of directors, on the 8th of April, 1857.

The resolution referred to in it was passed on the 2nd of May, 1856. It gives general power to him to make any contract with any corporation or individual. This is the only resolution ever passed by the board of directors conferring general powers upon Mr. Alton.

A resolution cancelling the said bonds numbered from 141 to 240 inclusive was adopted April 12th, 1858. I have the original record of the resolution here, and a copy of it.

108 The record of the resolution is read in evidence. A copy thereof, marked A, is attached hereto as a part hereof.

Raymond and Co. extended the time of payment of the money due for the iron that had been laid down, amounting to about $21,000, and retained forty of the bonds that had been hypothecated to them as collateral to that indebtedness. The company afterwards delivered to them two more bonds, to make the amount of security in their hands equal to that stipulated by the contract.

These forty-two bonds numbered 101 to 140 inclusive, and also 269 and 270, I believe remained in the hands of Raymond & Co. as collateral to that indebtedness, and are part of the same produced here, I believe, by Mr. Cross.

Mr. C. R. Alton was president of the company from the time of its organization to the 12th of April, 1858, when he was removed from the office of president, and he has not been president since

109 that time. The $100,000 of bonds to the city, and the $120,000 of bonds deposited with C. B. Raymond and Co., are all the bonds that were hypothecated, used or disposed of by authority of the company in any manner prior to the 12th day of April, 1858, so far as I have any knowledge either personally or from the books of the company. If there had been any others I think I should have been likely to know it.

Cross-examined.

I cannot give the numbers of the bonds placed in the hands of C. B. Raymond and Co., except forty of them.

Forty of them were numbered from 101 to 140 inclusive. The bonds were taken from those numbered from 101 to 270 inclusive. My impression is bonds numbered from 101 to 220 inclusive were so used. I don't think there is anything on the minutes of the board of directors to show the numbers of the bonds deposited with C. B. Raymond & Co.

110 I had nothing to do personally with the delivery of these bonds. I have no personal knowledge that bonds were delivered to C. B. Raymond & Co. My knowledge of that fact, is derived from a great variety of circumstances. I have no personal knowledge of the return of $80,000 of bonds by them, further than that I know of the return by them of the notes, for which the bonds were

deposited as collateral. I know also of the iron being received. Mr. Alton, then president of the company, did the negotiating with C. B. Raymond & Co. for the iron, I think. I had no negotiations with them myself. I get my information that the bonds remaining with them were numbered from 101 to 140 from statements of the president, C. R. Alton, and I think from correspondence with them and their successors, J. Boorman, Johnson & Co. I have no personal knowledge of that fact; I derive my knowledge from my position in the company.

I was a director in the company; I attended nearly all the
111 meetings of the board of directors of the company, and was familiar with its proceedings. The executive committee existed previous to April, 1857, and the one then existing was appointed February 18th, 1857, and continued to hold that office for a year or more, I think; they were H. Haertel, David P. Hull, C. R. Alton and E. Button. The executive committee was required by the by-laws to keep a record of their proceedings. I have in my office the record kept by them. I think there has been no new executive committee since April, 1857, although there have been changes in its members.

FRIDAY, 19 *August*, 1859.

The bonds of the first 270, other than those delivered to the city and to C. B. Raymond & Co., were either in the hands of the company, or, I suppose, in the hands of M. K. Jessup & Co., our financial agents, to whom they were sent for the signature of the trustee. Nineteen notes in all were given to C. B. Raymond & Co., amounting to $66,000 and a little over, as appears by the books of the company.

I did not deliver them; they were taken to New York
112 by Mr. Alton or sent there by mail to him, or to Mr. M. K. Jessup & Co. I find among the papers of the company in my office a memorandum of the notes delivered to Raymond & Co., and on the back of that a memorandum of the bonds deposited with them as collateral, and of their numbers; this I think is in Mr. Alton's handwriting. From this memorandum it appears that C. B. Raymond & Co. held, as collateral to those notes, one hundred and thirty-three first mortgage bonds, numbered 101 to 233 inclusive.

I suppose that of those, the bonds numbered 141 to 233 were afterwards returned to the company, from the fact that they afterwards held those numbered from 101 140 inclusive, but I have no personal knowledge. All the notes were returned to the company and cancelled. New notes were given for so much of the iron as was actually laid down; suits were afterwards commenced on these new notes; judgments were obtained on them against the company in the United

States District Court for the district of Wisconsin. I believe
113 those judgments have been satisfied; those judgments were for indebtedness of the company, for which the bonds had been placed in the hands of Raymond & Co. as collateral; when C. B. Raymond & Co. surrendered the old notes, they retained forty bonds, surrendering the other bonds and taking new notes of over $19,000; afterwards a new note of something over $900 was given to

them to make up the balance then found to be due to them, and two bonds were given to them as additional collateral; this surrender of the old notes was made at the same time that the new notes were given. The date of that transaction I cannot state; the date of the new notes is 23rd October, 1857, I believe.

When the bonds were first executed they were not placed in anyone's hands for negotiation, nor were they for a long time afterwards.

There were 550 bonds made, countersigned and signed; they
114 were numbered from 1 to 550 inclusive; they were not all then issued; one hundred of them ($100,000) were deposited with the city of Milwaukee, as collateral; two hundred and eighty bonds ($280,000) were afterwards sealed up, (my impression is that I saw them but I am not sure,) and sent to M. K. Jessup & Co. and were held in trust by them under a resolution of September 1st, 1857.

I think the numbers are from 271 to 550 inclusive. I don't think I then had any personal knowledge of these numbers. I know those were the bonds, not from sight of them but from my knowledge of the affairs of the company. I was not acting personally. I did not handle the bonds. I have very little personal knowledge as to the transactions. I understand, but I have no personal knowledge of it, that $133,000 in bonds were deposited with C. B. Raymond & Co., as I have
115 stated. I could not tell where the remaining thirty-seven bonds went. Two bonds, numbered 269 and 270, were delivered to C. B. Raymond and Co., or to their successors, Boorman, Johnson & Co., as collateral to the $900 note, as I have stated. Twenty-eight bonds, numbered 241 to 268 inclusive, were delivered to the city of Milwaukee on the 24th of April, 1858.

These thirty bonds were disposed of by myself. That leaves seven bonds unaccounted for; only 550 bonds of $1000 each.

The executive committee did not appoint any general agent; Mr. Alton acted for the company as president, and in negotiations for the company he from time to time reported transactions which, if satisfactory to the committee were approved. Most of the business was transacted by and through Mr. Alton, as the representative of the company. He was the medium through whom the committee transacted most of their business, although not exclusively.

116 I have here the minutes kept by the executive committee. They only embrace three meetings, from April 8th, 1857, to August 11th, 1857. Mr. James was the secretary of the committee. The executive committee very seldom or never met, as it was nearly as convenient to have a meeting of the board of directors as of the committee. I suppose these were all the meetings of the committee, but I do not know. While Mr. Alton was connected with the board most all of the financial business was transacted through him. He is not still the president of the company. I think the last general election of officers took place February, 1857, at which Mr. Alton was elected president. One hundred and twenty-eight bonds ($128,000) are held by the city of Milwaukee at this time. Besides the interest due from the company on its bonds, there is, I understand, a balance of over $10,000 due from it to

117 its contractors; it owes me $3,000; it owes for right-of-way $3,000 or $4,000, for which judgments have been recovered; it owes some $5,000 or $6,000 for right-of-way besides; it owes about $20,000 for two locomotives. I don't know where they are. The company also owes a balance for freight of some $6,000 to $10,000. There is, in addition, a floating indebtedness exceeding, I think, $20,000. I think the actual cost in cash of the road, as now available to a new company going on with the road, including all the right-of-way to Cedarburg, is about $100,000; it may be more. The company expended a good deal of money for engineering, running over a good many routes.

I am secretary of the company, and have been since the tenth of October, 1857, and have had charge of the books and papers of the company at my office since the twelfth of April, 1858.

THURSDAY, 25*th August*, 1859.

Examined by Mr. H. L. Palmer:

This paper marked B is a copy of a resolution of the board
118 of directors of the company, adopted by them 2nd January, 1857. The original is now produced by me here. (Original resolution produced by counsel.)

This paper marked C is a copy of a resolution of the board of directors of the company, adopted by them on the same day, embracing a copy of the contract with Bailey Brothers & Co. I have not the original contract here. I have it at my office, and the original record of the resolution here. (Record produced and copies marked B and C annexed hereto.)

I have the records of the meeting of the board on the 18th February, 1857. I find there a resolution of which the paper marked D is a copy. The original record is now produced by me.

I have likewise the record of the meeting of the board on the 8th of April, 1857. The paper marked E is a copy of a resolution passed at that meeting, as appears by that record.

119 I have likewise the record of the meeting of the board on the 1st September, 1857. I find in it a record of a resolution adopted by the board on that day, of which the paper marked F is a copy.

I have here the record of the meetings of the board held on the 21st September, 1857, and on October 10th, 1857. The record shows that on the 21st September. 1857, a resolution was adopted by the board of which the paper marked G contains a copy. The same paper also contains a copy of some proceedings of the board at its meeting on the 10th October, 1857, being a report and resolution marked G (2.)

I have the record of a meeting of the board held March 4th, 1858. I contains a resolution, a copy of which is produced, marked H, which resolution was passed by the board on that day.

I have the record of a meeting of the board held 12th April, 1858. The paper marked I is a copy of some of the proceedings of the board

on that day, including a report and two resolutions which were
120 adopted by the board.

I have the record of a meeting of the board held 24th April, 1858. A resolution was passed at that meeting, of which the paper marked J is a copy.

I have also the record of a meeting of the board held March 3d, 1859. A resolution was passed at that meeting, of which the paper marked K is a copy.

I have the records of a meeting of the board held 21st April, 1859. They comprise two resolutions passed at that meeting, of which the paper marked L is a copy.

I have the records of a meeting of the board held 17th May, 1859. They comprise a communication made to the board and resolutions adopted by it at that meeting. A copy of them is contained in the paper marked M.

When this suit was instituted (in December, 1858,) the only available property of the company, the only property of the company which possessed any value, was mortgaged or hypothecated to secure liabilities of the company to an amount quite equal to, and probably exceeding, the value of the property at that time.
121 Besides the liabilities so secured, the company was owing various parties to an amount exceeding in the aggregate, I think, $25,000, (twenty-five thousand dollars.) The liabilities enumerated by me the other day in this testimony were liabilities existing against the company at that time. The company is not now engaged in constructing the road. The operations of the company in the way of constructing the road ceased about October, 1857.

At the time this foreclosure was commenced Bailey Brothers & Co., or their representatives, held forty-two bonds. The 280 bonds ($280,000) delivered to them in the spring of 1859, were delivered to them in pursuance of this resolution of 21st April, 1859, (marked L.) The 28 bonds ($28,000) were delivered to the city April 24th, 1858, in pursuance of a resolution of the board passed on that day, (a copy of which is here marked J.) Neither C. R. Alton nor any other person had any authority to dispose of any of the bonds of the company at any time after they were issued, except that given by the resolutions which I have mentioned, and which are contained in this deposition, or copies of which have been produced by me, and are to be
122 annexed hereto and marked as above stated. The city of Milwaukee issued and loaned to the company its bonds to the amount of one hundred thousand dollars, which the company received, I think in March, 1857, upon conditions mentioned in the report of a committee of the common council of the city made on that subject, I think, on the 2d of February, 1857. Among other things the company was to pay the interest on those city bonds semi-annually, in the city of New York, at the rate of seven per cent. per annum, and the principal of the city bonds at their maturity, twenty years from their date. The $100,000 bonds first, and afterwards $28,000 additional, were delivered by the company to the city as security for the performance of that and other conditions mentioned in that re-

port of the committee of the common council. Another condition was that the first twenty miles of the road north of its junction with the La Crosse road, should be completed and equipped, I think, by the 1st of July, 1858. The bonds were delivered to secure the performance of that condition, and also to secure the payment of the principal and interest of the city bonds until such twenty miles
123 should be completed and equipped as above stated. The full arrangement appears in the report of the committee which I have mentioned. The grading of the road for ten or eleven miles has been completed, and the track has been laid for nearly five miles. The company first defaulted in the payment of interest upon the city bonds on the first day of January, 1858, as I understand, and I believe no interest has been paid by the company since that time on those bonds.

(The counsel for Mr. James B. Cross objects to the whole of the foregoing deposition, which is taken subject to such objection.)

Cross-examined.

By the counsel for Mr. James B. Cross:

The city also received other security besides these $128,000 of bonds, for the performance of the conditions I have referred to. It received the bond of the company in a penalty of $200,000, with conditions as mentioned in section 3, chapter 244, of the private and local acts of 1853; also, a second mortgage on the company's road given to secure said bond, covering the first twenty miles of said road next north of its junction with the La Crosse and Milwaukee Railroad. The mortgage was executed, with the terms and conditions mentioned in section 4 of the act 1 last referred to. As further indemnity the city received the personal bond of C. R. Alton,
124 H. Haertel, E. Button, D. P. Hull, Julius White, and J. Stark, the witness, in the penal sum of $150,000, conditioned for the completion of the twenty miles of the road covered by the mortgage to the city by the first day of July, 1858, I think, and for the payment of the principal and interest of the city bonds until so much of the road should be completed. To secure the performance of the conditions of the last-named bond, the city also received a certificate for one thousand shares of the capital stock of the company, of which the par value was $100,000; also, farm mortgage bonds of the company of the par value of $50,000, and also the first mortgage bonds above mentioned. The city bonds ($100,000) were received by the company and sold by it. I do not know whether the city has paid any interest on these bonds. The city gave no other consideration to the company for its first mortgage bonds than its own bonds, which I have mentioned.

JOSHUA STARK.

125 A.

APRIL 12TH, 1858.

On motion of Mr. Hull,

Resolved, That one hundred bonds of one thousand dollars each, bearing date January 1st, 1857, numbered one hundred forty-one (141) to two hundred forty (240) inclusive, and secured by a mortgage or trust deed of the railroad of the Milwaukee and Superior Railroad Company, executed to the Farmers' Loan and Trust Company of the city of New York, as trustees, bearing date on the same day, together with all coupons to said bonds attached, be, and the same are hereby cancelled and annulled, and declared to be void and of no binding effect upon said company whatever, said bonds never having been issued, negotiated, or disposed of by said company, or any authorized officer or agent thereof.

Which resolution was adopted by the following vote: Ayes—Messrs. Haertel, Hull, Button, Grenlich, and Stark. Noes—none.

B.

JANUARY 2ND, 1857.

Resolved, That the president of this company, C. R. Alton, be, and he is hereby fully authorized and empowered to execute a mortgage upon the first division of this company's road between the city of Milwaukee and the city of Green Bay, a distance of about
126 one hundred and twenty miles, and upon all the rights and franchises, real and personal estate and property thereunto belonging, bearing date on the 1st day of January, 1857, to the Farmer's Loan and Trust Company, a corporation duly organized under the laws of the State of New York, to secure an issue of the bonds of this company to the amount of twelve hundred thousand dollars, and to provide in said mortgage for the payment and depositing towards a sunking fund semi-annually, on the first day of January and July in each year, commencing on the 1st day of January, A. D. 1861. Such sum or sums as with interest accruing thereon shall be sufficient to pay, on the maturity thereof, the whole amount of said bonds outstanding and not converted into the capital stock of said company, and to prepare and execute the bonds to be issued under said mortgage to the amount of twelve hundred thousand dollars, in sums of one thousand dollars each, numbered from one (1) to twelve hundred (1,200) inclusive, bearing date the 1st day of January, A. D. 1857, and payable in the city of New York in twenty years from the date thereof, with interest at the rate of eight per cent. per annum, payable semi-annually on the 1st day each of January and July ensuing the date thereof, with interest cou-
127 pons attached, and convertible into the stock of the company at any time within five years from the date thereof.

C.

JANUARY 2ND, 1851.

Resolved, That the contracts, correspondence, and papers accompanying the report of C. R. Alton, president, relating to the purchase of 4,000 tons of iron rails from C. B. Raymond & Co., of New York, and of five locomotives from the Boston Locomotive Works, and the acts of said Alton in relation thereto, be, and the same are hereby approved, ratified, and confirmed, and the secretary is hereby directed to enter said papers of record.

The contracts, correspondence, and papers referred to in the foregoing resolution are as follows, to wit:

1st. This memorandum of an agreement made this 4th day of December, A. D. 1856, by and between Bailey Brothers & Co., of Liverpool, G. B., by their agent, C. B. Raymond & Co., of the city of New York, of the first part, and the Milwaukee and Superior Railroad Company, a corporation duly established by a law of the State of Wisconsin, by their president, C. R. Alton, of the second part, witnesseth:

That said Bailey Brothers & Co., by their agents, C. B. Raymond & Co., as aforesaid, have this day sold and agreed to deliver to said Milwaukee and Superior Railroad Company four thousand tons
128 of iron rails of a T pattern, so called, to weigh about fifty-six pounds per lineal yard, pattern same as that furnished by said Bailey Brothers & Company to the Racine and Mississippi Railroad Company; ninety per cent. of entire quantity to be eighteen feet long, and remaining ten per cent. in lengths not less than twelve and a half feet long; to be sound bars, cut square at both ends, of good merchantable quality in material and workmanship. Said Bailey Brothers and Co. agree to ship said four thousand tons of iron rails on board vessels in Great Britain bound to sail to the port of New York, said shipments to be made in the months of March, April, and May next.

In consideration of which aforesaid undertaking by said Bailey Br's & Co., said Milwaukee and Superior Railroad Company agree to receive said iron rails on arrival at said port of New York, and then and there to pay said C. B. Raymond & Company for each and every ton of said rails so received, fifty dollars per ton at most, that is to say, for the rails free on board ships at port of shipment, insurance and freight to said port of New York included. Said railroad company agree to enter said rails at custom-house, and ac-
129 count for the duties thereon in addition to said price of fifty dollars per ton at most. Said fifty dollars per ton at most shall be paid to C. B. Raymond and Co. in manner following: In cash for amount of freight on each parcel or cargo, balance in notes of said railroad company, made payable in the city of New York to the order of their treasurer, and by him endorsed at six, nine, and twelve months, equal amounts, with interest at rate of seven per cent. added, said notes to be endorsed by C. R. Alton, H. Haertel, Edward Button, and D. P. Hull, or others in responsibility, satisfac-

tory to said C. B. Raymond & Co., with said notes so endorsed, shall be lodged the first mortgage eight per cent. bonds of said railroad company with said C. B. Raymond & Co., at fifty per cent.; that is, for every dollar in notes two dollars in bonds; it being expressly agreed that in case of default in payment of any of said notes said C. B. Raymond & Co. have the right, and are hereby authorized to sell said bonds at auction or otherwise, without notice to said railroad company and apply the proceeds to said default; said payments in cash and notes, and said deposits of bonds to be made for each parcel or cargo on arrival at said port of New York, the notes
130 to date from said arrivals, and all settlements or payments to be made in the city of New York. It is mutually agreed that notwithstanding said railroad company pay freight and provide for duties on said iron rails and have nominal possession for custom-house purposes, that actual possession remains with said C. B. Raymond & Co., through their trustee, Morris K. Jessup, until said rails are laid down on the road of said railroad company. This provision is made to retain the iron as security to said C. B. Raymond & Co., until it is actually laid down on the road of said company. It is further mutually agreed that said Bailey Brothers & Co. shall not be held responsible for any delays which may arise from loss, capture, or casualty at sea, to any parcels or cargo of said rails, or in consequence of any war that may exist, or prospects of war at times of shipment, or in consequence of strikes of workmen, and they shall not be bound to replace any parcel or cargo lost or missing at sea unless notified in writing by said railroad company, said notice to be given immediately after such loss is ascertained; and upon receipt of said notice said Bailey Brothers & Co. shall proceed to reship as soon as practicable for them so to do.

In witness whereof, the parties hereto have interchangeably
131 set [set] their hands and seals this 4th day of December, A. D. 1856.

(Signed) BAILEY BROTHERS & CO.
Pr. C. B. RAYMOND & CO., *Agents.*

(Signed) MILWAUKEE & SUPERIOR R. R. CO.,
Pr. C. R. ALTON, *President.*

D.

MILWAUKEE, *February* 18, 1857.

On motion of Mr. Stark it was

Resolved, That the president and secretary be, and they hereby are authorized and empowered to make, execute and deliver to the city of Milwaukee, or the proper officers thereof, all the instruments of and the securities required to be executed and delivered by the company, by the terms of the report of the railroad committee, of the common council of Milwaukee, and the resolution accompanying the same, adopted Feb'y 2nd, 1857, as security for the issue to this company of the bonds of said city, and said president and secretary are especially authorized and directed to execute the bonds and

mortgages required by said report and resolutions to issue, and deliver a certificate of one thousand shares of stock of said company, and to assign and deliver fifty thousand dollars of the farm
132 mortgage bonds of said company as required by and for the purposes stated in said report and resolution.

E.

MILWAUKEE, *April* 8, 1857.

On motion of Mr. Hull, it was unanimously

Resolved, That the president, C. R. Alton, be directed to forward to M. K. Jessup & Co., of New York, first mortgage bonds of this company, from No. 101 to 550, inclusive, amounting to $450,000, to be indorsed by the trustees in the mortgage, with instructions to have the imperfect bonds now in their hands, No. 101 to 150, inclusive, amounting to $50,000, cancelled by said Williamson and returned to this company, and with further instructions to hold $450,000 first mortgage bonds, when so executed, subject to the order of this company.

F.

MILWAUKEE, *Sept.* 1*st*, 1857.

Mr. Haertel presented the following preamble and resolutions:

Whereas, the Milwaukee and Superior Railroad Company did, by resolution of its board of directors, passed the 2nd day of January, A. D. 1857, authorize the execution of a mortgage on the first division of its road between the city of Milwaukee and the city of Green Bay, a distance of one hundred and twenty miles, to secure the
133 issue of the bonds of the company to the amount of twelve hundred thousand dollars; and whereas, under authority of said resolution, said mortgage was executed, providing for the issue of five hundred and fifty thousand dollars of said bonds, during the present year, and of six hundred and fifty thousand dollars of said bonds during the year eighteen hundred fifty-eight; and whereas, in consequence of the difficulties attendant upon the progress of railroad enterprises, at the present time, it has been deemed expedient to proceed more slowly than was originally contemplated with the construction of said Milwaukee and Superior railroad, and for the purpose of affording a more satisfactory and certain security to the holders of any of said mortgage bonds, it is hereby resolved by the board of directors of said company that no more than two hundred and seventy thousand dollars of [of] said bonds, including bonds from number one to two hundred and seventy, inclusive, shall be issued, used, or hypothecated by this company till after the payment to C. B. Raymond & Co. of the present indebtedness of said company to said C. B.
134 Raymond & Co., nor until said railroad shall be completed to a point at least twenty-seven miles from the city of Milwaukee, in the direction of, and towards the city of Sheboygan.

And it is further resolved, that no more bonds, beyond the five

hundred and fifty thousand dollars authorized to be executed this year, shall be executed by said company until their said road shall be completed and in operation to the city Sheboygan, and that until the indebtedness to the said C. B. Raymond & Co. shall be paid and the road completed to said point, twenty-seven miles north from the city of Milwaukee. All of said five hundred and fifty thousand dollars in bonds, after deducting two hundred and seventy thousand dollars therefrom, shall be placed in the hands of Messrs. M. K. Jessup and Co., in trust, not to be delivered by Messrs. M. K. Jessup and Co. to the officers and agents of said railroad company until the trust for which they are placed in their hands shall be fully performed and accomplished; said bonds to be sealed up with the joint seals of the president of said company and said C. B. Raymond and Co.

135 Which preamble and resolutions, after having been read by the secretary, were, upon motion of Mr. Hull, unanimously adopted, and the secretary instructed to forward certified copies to Messrs. C. B. Raymond & Co. and Messrs. M. K. Jessup & Co., under the corporate seal of the company.

G.

On motion of Mr. Hull, it was unanimously

Resolved, That the president and secretary be authorized and directed to execute a chattel mortgage upon all the iron rails now in possession of this company to C. B. Raymond and Co., to be delivered to them when they will release the endorsers upon the notes to them for the purchase of said rails; and the president is further authorized to treat with said C. B. Raymond and Co. for the sale to them of so many of the first mortgage bonds of this company as will pay for the iron purchased, at rates that may be agreed upon between said president and said C. B. Raymond & Company.

G (2.)

SATURDAY, *October* 10*th*, 1858.

The president then laid before the board the following report and statement:

To the Board of Directors of the Milwaukee and Superior R. R. Co.:

136 GENTLEMEN: Under the authority given by the action of the board at their last meeting, I have, as president, communicated with C. B. Raymond & Co. upon the subject of securing them by a chattel mortgage upon the balance of the railroad iron purchased of them by the company.

They prefer, however, to take back the iron remaining on hand, and to deliver up the notes of the company to the amount of the purchase money of the iron returned, and consented, at the same time, to extend the notes of the company, without endorsement, for the iron laid down. Believing this arrangement, in the present condi-

tion of the money market, to be a favorable one for the company, I assented to it, and executed and delivered to C. B. Raymond & Co. a bill of sale for the amount of iron on hand—supposed to be about 947 tons—which they accepted under the arrangement mentioned. The bill of sale is dated Sept. 30th, 1857.

Yours, respectfully,

C. R. ALTON, *President.*

Which was, on motion of Mr. Hull, accepted, and ordered to be placed on file; and the following resolutions were unanimously adopted in relation thereunto:

Resolved, That the arrangement made by C. R. Alton, presi-
137 ident, with C. B. Raymond & Co. for the return of the iron rails not yet laid down by the company, and the surrender by them to the company of the endorsed notes of the company, given for said iron, and the extension of time for the payment of the balance due or to become due for said iron, upon notes of said company, without endorsement, and the bill of sale of said unlaid iron executed by the president to C. B. Raymond & Co., Sept. 30th, 1857, be, and the same are hereby fully approved, ratified and confirmed, and that the president be authorized to execute such agreements, contracts or instruments, of whatever kind, on part of the company, and to do and perform all such acts and things for the carrying out of such arrangement as he shall deem necessary and for the interest of the company.

Resolved, That the president be directed to cause the chattel mortgage of said iron to C. B. Raymond & Co., heretofore authorized to be executed to them to secure the indebtedness of the company to them, to be filed in the office of the city clerk until after the full consummation of said arrangement with said C. B. Raymond & Co., and the delivery of said iron to them in pursuance thereof.

G (2.)

138 H.

MILWAUKEE, *March 4th*, 1858.

On motion of Mr. Stark, it was

Resolved, That C. R. Alton, president, and Herman Haertel, vice president of the company, be, and are hereby authorized and empowered together to make such contracts and agreements with any persons or corporation, by raising of money for the payment of interest on Milwaukee city bonds and farm mortgage bonds of this company by sale or other disposition of any securities or property of the company as to them shall seem best and most for the interest of the company, and they are further authorized to enter into negotiations, and to contract with any party or parties in the city of New York or elsewhere for the payment or assumption by them of the indebtedness of the company or any part thereof; such contract or contracts, however, to be subject to the approval of the board of directors. No contract or agreement by either said Alton or Haertel,

under this resolution, shall be valid and binding upon the company unless concurred in at the time by the other.

139 Resolved further, That all resolutions heretofore adopted authorizing any person or officers of the company to dispose of any securities or property of the company, or to make contracts in the name or in behalf of the company for that or any other purpose, be, and the same are hereby rescinded, and the authority conferred thereby is hereby revoked.

Resolved, That C. R. Alton, president, and H. Haertel, vice president of this company, be, and they are hereby directed to deposit all the first mortgage bonds of the first issue of two hundred and seventy thousand dollars, not now in the hands of C. B. Raymond & Co., and of the city of Milwaukee, with Messrs. Kuchne & Co., of the city of New York, subject to the joint order of the board of directors of this company.

H

I

MILWAUKEE, *April 13th.* 1858.

Mr. Haertel laid before the board the following report of his doings in New York, which was, on motion of Mr. Hull, ordered to be spread at length upon the minutes of this meeting.

140 To the Board of Directors of the Milwaukee and Superior Railroad Company:

GENTLEMEN: In pursuance of the action of the board, had at their meeting held on the fourth of March last, I proceeded at once to New York, where I had an interview with Mr. Alton on the 8th of March, and presented him with certified copies of the resolutions of the board relating to his powers as president, and to the disposition to be made of the first mortgage bonds in his hands, passed March 4th.

On enquiry, I learned from him that he had left the $100,000 in first mortgage bonds, which he had represented to the board as under his control, with Mr. Levi Blossom for safe keeping, and that they were deposited by Mr. Blossom in a private box kept by him in the vault of Wm. J. Bell & Co., bankers, in New York. He also stated that Mr. Blossom would be in New York in a day or two, and would deliver the bonds to him, and that they should then be placed in the hands of Kuchne & Co., as directed by the board. During the two weeks following this interview I met Mr. Alton daily, and conversed with him, and in all our conversations he assured me,

141 in the most unqualified manner, that the bonds had been placed in the hands of Mr. Blossom, merely as a friend, for safe keeping, and were not subject to any lien, claim, or charge whatever, either of Mr. Blossom or of any other person, and that he should without fail come into possession of the bonds immediately on Mr. Blossom's arrival.

Mr. Blossom, in the meantime, did not arrive. On enquiring at the office of Wm. J. Bell & Co., I was informed that he had no box in their vault, though formerly he had at one time such a box deposited with them for safety. Some two weeks after my arrival in New York I learnt that Mr. Blossom was in Washington. Anxious to learn the precise truth in regard to the bonds, I went to Washington, on the 25th of March, to see Blossom. Meeting him on the day after my arrival there, he stated to me that he had possession of the bonds. I told him Mr. Alton and myself were very anxious to get possession of them as soon as possible, as the company desired to make immediate use of them. I asked him directly if he had any claim on the bonds, to which he avoided a direct reply, saying, "Did not Mr. Alton tell you all about it? He has done wrong; he should have told you; he ought to have come over here himself."

142 I could get no further explanation from Mr. Blossom than this; but at the same time I gave official notice, in the name of the company, that Mr. Alton was not authorized to use the bonds for any purpose, and that any pledge or disposition of them by him would be treated as void by the company. I returned to New York the following day, having the promise of Mr. Blossom that he would be in New York on Monday morning, the 29th of March, at the Astor House, to meet Mr. Alton and myself there. On Monday Blossom did not arrive in New York, and I telegraphed to Washington to learn the cause, and received a prompt reply that he was detained by the sudden illness of a child. Mr. Alton during the day showed me a letter from Blossom, written on the 28th, in which he explained more fully the cause of his detention. Mr. Alton then concluded to go to Washington, and as I had been absent from home nearly four weeks, and much longer than anticipated when I left, and thought it useless to wait longer, I determined to return home without waiting for the result. On leaving Mr. Alton I was again assured most positively that as soon as he could get Mr. Blossom to New York

143 he would certainly get the bonds from him, and return them to the company. On the day after I reached home I received a letter from Mr. Alton, dated New York, March 31st, 1858, which I append to this statement. I regret very much that my journey has been unsuccessful in procuring the bonds. I was untiring in my efforts, meeting and conferring with Mr. Alton several times each day. In the course of our conversations Mr. Alton admitted to me that he has used farm mortgages of this company to the amount of five thousand dollars in private speculation in New York, without the knowledge or authority of the company, and of which he has hitherto failed to render any account. He promised to procure these mortgages and return them to the company.

Very respectfully submitted,

H. HAERTEL,
Vice President.

Copy of the letter referred to in the foregoing report.

NEW YORK, *M'ch* 31, 1858.

H. Haertel, Esq.

SIR: I returned from Washington this morning. Mr. Blossom will come over as soon as his child recovers, and will deliver the bonds to me. You had better take such steps with the city, as yourself and
144 the other directors think proper, based upon the receipt of these bonds, as there can be no failure about them. I shall return to Milwaukee as soon as possible.

Yours, &c.,

C. R. ALTON.

On motion of Mr. Stark, it was

Resolved, That C. R. Alton be, and he is hereby removed from the office of president of the Milwaukee and Superior Railroad Company. Adopted by the following vote: Messrs. Haertel, Hull, Button, Grenlich, and Stark, in the affirmative; none in the negative.

On motion of Mr. Hull,

Resolved, That one hundred bonds of one thousand dollars each, bearing date January 1st, 1857, numbered one hundred forty-one (141) to two hundred forty (240,) inclusive, and secured by a mortgage or trust deed of the railroad of the Milwaukee and Superior Railroad Company, executed to the Farmers' Loan and Trust Company, of the city of New York, as trustees, bearing date on the same day, together with all coupons to such bonds attached, be, and the same are hereby cancelled and annulled and declared to be
145 void and of no binding effect upon said company whatever; said bonds never having been issued, negotiated, or disposed of by said company, or any authorized officer or agent thereof; which resolution was adopted by the following vote: Ayes—Messrs. Haertel, Hull, Button, Grenlich, and Stark. Noes—none.

J.

MILWAUKEE, *April 24th*, 1858.

Resolved, That the secretary deliver to the treasurer of the city of Milwaukee, the first mortgage bonds of this company, numbered two hundred & forty-one to two hundred and sixty-eight, inclusive, amounting in all to twenty-eight thousand dollars, to be held by him for the benefit of the city of Milwaukee, as a farther security of the city against loss by reason of the issue and loan of her bonds heretofore made to this company.

K.

MILWAUKEE, *March 3rd*, 1859.

Mr. Button introduced the following resolutions, which were read and unanimously adopted:

Resolved, That the resolutions adopted by the board of directors of this company, at their meeting on the 1st of September, 1857,

whereby the amount of the first mortgage bonds, to be issued, used, or hypothecated by this company, until after the payment to
146 C. B. Raymond & Co. of its indebtedness then existing to said C. B. Raymond & Co., was limited to two hundred and seventy thousand dollars, and directing that the balance of the 1st issue of first mortgage bonds, amounting to two hundred and eighty thousand dollars, should be placed in the hands of M. K. Jessup & Co., of New York, in trust, not to be delivered to this company until after the payment of this indebtedness to said C. B. Raymond & Co., be, and the same are hereby, rescinded and repealed, except so much thereof as restricted the whole amount of first mortgage bonds to be executed and issued before the completion of said company's road to Sheboygan, to five hundred and fifty thousand dollars; provided the successors of C. B. Raymond & Co., as agents of Bailey Brothers & Co., give their consent thereto.

Resolved, That that the first mortgage bonds of this company, now in the hands of M. K. Jessup & Co., New York, amounting to two hundred and eighty thousand dollars, be transferred and delivered to Messrs. Boorman, Johnston & Co., agents of Bailey Bros. & Co., as additional collateral security for the payment of the indebtedness of said company to them, and that the president of this
147 company be, and is hereby, directed to give the said Boorman, Johnston & Co. an order on Messrs. M. K. Jessup & Co. at New York therefor, for the purpose hereinbefore mentioned.

L.

MILWAUKEE, *April* 21*st*, 1859.

On motion of Mr. Button, the following preamble and resolutions were adopted:

Whereas, by resolution adopted by this board on the 3rd day of March, 1859, this company authorized and directed two hundred and eighty of the first mortgage bonds of this company, for one thousand dollars each, which had been theretofore lodged with M. K. Jessup and Co. of New York, to be transferred and delivered to James Boorman, Johnston & Co. of New York, as agents of Bailey Bros. & Co. of Liverpool, as additional collateral security for the payment of the indebtedness of this company to said Bailey Bros. & Co.; which said indebtedness is now partially in judgment and partially in suit in the District Court of the United States for the district of Wisconsin; and whereas the said J. Boorman, Johnston & Co., as such agents, are, as is represented, about to assign said indebtedness to certain parties in Wisconsin: Therefore,

Resolved, That the said J. Boorman, Johnston & Co. be, and
148 they are hereby, authorized and empowered to transfer and deliver to any assignee or assignees of such indebtedness all the first mortgage bonds of this company, which are held by them as collateral to said indebtedness, including the said two hundred and eighty bonds received or to be received by them from said M. K. Jessup & Co. under the authority aforesaid; and that they may so

transfer and deliver all of said bonds to such assignee or assignees, to be held by him or them as collateral security to said indebtedness, as fully and effectually and to all intents and purposes as the said J. Boorman, Johnston & Co. might or could hold the same, but for such assignment, transfer, and delivery.

On the adoption of this resolution, those who voted in the affirmative, were Messrs. Haertel, Button, Harrington, Hopkins, Greulich and Stark. Negative—None.

M.

MILWAUKEE, *May 17th*, 1859.

The president laid before the board the following communication from J. B. Cross, to wit:

MILWAUKEE, *17th May*, 1859.

To the board of directors of the Milwaukee and Superior R. R. Co.:

GENTLEMEN: We are the holders of three hundred and
149 twenty-two of the first mortgage bonds of your company, which we received by assignment from Messrs. J. Boorman, Johnston & Co. of New York; we holding them, as they did, as collateral security to certain claims now in judgment against the company and Haertel and others, endorsers. We desire to become, if practicable, the owners, absolutely, of these bonds, and to that end propose, as a consideration for their purchase, to cancel and discharge all the judgments against the company, Mr. Haertel, and others, amounting in the aggregate of principal indebtedness, to about twenty-two thousand dollars, besides costs, which we now own as assignees of Johnston and Co.

We conceive this to be more than the real value of the bonds, and more than they could be made to produce on sale, but should you desire to have them sold at public sale, and thus offer an opportunity for competition, we will advertize and so sell them; in which event we should desire you to authorize us to bid and become purchasers at the sale, we agreeing to bid therefor a price not exceeding in the aggregate the amounts due on the judgments, and cancel them. Should you accede to our proposal, be kind enough to
150 express your assent in the form of a resolution, at an early day.

Yours, respectfully,

(Signed) J. B. CROSS.

The communication having been read, it was—

Resolved, That the same be filed and recorded in the minutes of this meeting; and on motion of Mr. Button, the following preamble and resolution was unanimously adopted:

Whereas James B. Cross, of the city of Milwaukee, by assignment from J. Boorman, Johnston & Co. of New York, has become the owner of several judgments recovered by said J. B. Johnston & Co. in the District Court of the United States for the district of Wiscon-

sin, against the Milwaukee and Superior Railroad Company, and Herman Haertel, Carda R. Alton, Edward Button, and David P. Hull, and has, with the consent of this company, also received from said J. B. Johnston & Co. three hundred and twenty-two first mortgage bonds of this company, numbered, respectively, 269, 270, 101 to 140, inclusive, and 271 to 550, inclusive, for $1,000 each, which were held by said J. B. Johnston & Co. as collateral security to the indebtedness of this company to said Johnston & Co., on which the judgments above referred to were recovered.

151 And whereas said James B. Cross now holds said bonds as collateral to the same indebtedness now merged in said judgments, amounting, with interest and costs, to about the sum of twenty-three thousand dollars, but without express authority to sell any of said bonds so pledged to him for the payment of said indebtedness, except Nos. 269, 270 and 101 to 140, inclusive;

And whereas said James B. Cross has, in and by a communication this day addressed by him to this board, proposed and agreed that if this company will authorize him to offer said bonds for sale at public auction for the payment of said judgments, he will guarantee that the same shall be sold for a sum sufficient in the aggregate fully to pay, satisfy, and discharge all of said judgments above referred to: Therefore,

Resolved, That the said James B. Cross be, and he is hereby, authorized and empowered to advertise and sell said bonds so held by him, or so many of them as shall be necessary, at public auction, to the highest bidder for cash, giving at least five days' notice of the time and place of such sale, for the purpose of paying and satisfying the said indebtedness, including interest and costs on said

152 judgments; provided, however, that the whole of said bonds, or so many thereof as shall be so held, shall not be sold for a less sum in the aggregate than sufficient to pay, cancel, and discharge in full all the said judgments, with interest and cost of suit.

Resolved, That this company hereby consents that on such sale said James B. Cross may bid upon and purchase said bonds in like manner as any other person, but not for a less sum in the aggregate than the amount due on said judgments for damages, interest and cost.

These resolutions were adopted by the following vote: Ayes—Messrs. Haertel, Button, Stark, Greulich, and Harrington. Noes—None.

Ald. Greulich, from the committee on railroads, to whom was referred the application of the Milwaukee and Superior Railroad Company for an issue of city bonds to aid in the construction of their railroad, reported as follows:

The committee on railroads, to whom was re-referred their report of January 10th, 1857, upon the petition of the Milwaukee and Superior Railroad Company, praying for an issue of city bonds in aid of the construction of said road, beg leave to return their said report to the council, and to recommend, that the bonds of the city to

153 the amount of one hundred thousand dollars be issued to

said Milwaukee and Superior Railroad Company upon the terms and conditions mentioned and contained in said former report, and upon the following conditions in addition thereto:

Sixth. Said company shall, as a further collateral security for the performance of the covenants and conditions of the personal bond in said report referred to, assign and deliver to the city treasurer fifty thousand dollars of the farm mortgage bonds of said company, secured by farm mortgages on real estate near the line of said railroad, to be delivered up by the city to said company whenever the said road shall be completed ready for the superstruction from the junction with the La Crosse and Milwaukee railroad to the junction with the air-line railroad at or near Cedarburg, in Ozaukee county. The committee would state that recent arrangements have placed the control of the air-line railroad from Milwaukee to Fond-du-Lac in the hands of the officers of the Milwaukee and Superior Company, and that the first 18 or 20 miles of the Superior road will be used by both companies jointly; that the construction of the air-line road from the point of junction with the Superior road is to be com-
154 menced at once, and will be prosecuted simultaneously with the construction of the Milwaukee and Superior; that the aid asked for the latter company will thus contribute directly to assist in the construction of the Fond-du-Lac road, which it is believed is not second in importance to any road now projected in this State.

The committee think it proper to state further that there is good reason to expect that a favorable running connection may be secured with the Wisconsin and Superior land grant roads by both the air-line and Milwaukee and Superior roads at their respective points of junction.

If this can be done, the advantage of Milwaukee over other lake shore towns, and especially those south of her in the trade of northern Wisconsin, is too evident to need illustration. We are therefore strongly in favor of the issue of bonds to the Milwaukee and Superior Railroad Company, as hereby recommended, because we believe the aid thus given will equally advance the construction of two very important lines of roads, the speedy completion of which is an object of great importance to our city.

The committee recommend the adoption of the following resolution, to wit:

155 Resolved, That when the Milwaukee and Superior Railroad Company shall have delivered to the city the securities and obligations as specified in the several conditions of the foregoing report and of the former report therein referred to, then the mayor and city clerk are hereby authorized and directed to execute and deliver to said company Milwaukee city bonds to an amount not exceeding one hundred thousand dollars, payable in twenty years, with interest semi-annually at the rate of seven per cent. per annum, at the Union Bank of New ork, in the city of New York.

The former conditions and securities referred to are as follows:

First. Said railroad company shall execute and deliver to the treasurer of said city of Milwaukee, for the use and benefit thereof,

the bond of said company in the penal sum of two hundred thousand dollars, with covenants and conditions for the security and safety of said city, as provided in section third of the act above referred to.

Second. To secure the performance of the conditions of said bond, said railroad company shall execute and deliver to the treasurer of said city of Milwaukee, for the use and benefit thereof, a mortgage in due form of law, conveying a portion of their railroad twenty miles in length next to said city, as provided by section four of
156 the act above referred to, and with the covenants and conditions, and subject only to the prior lien therein mentioned and contained.

Third. Conda R. Alton, Herman Haertel, David P. Hull, Julius White, Edward Button, Joshua Stark, directors of said railroad company, shall execute and deliver to the city of Milwaukee, for the use and benefit of said city, a bond in the penal sum of one hundred and fifty thousand dollars, binding themselves jointly and severally faithfully to expend the proceeds of the city bonds issued to the said Milwaukee and Superior Railroad Company in the construction and equipment of that portion of their railroad between the city of Milwaukee and a point twenty miles northward of the junction of their railroad with the La Crosse and Milwaukee railroad, and to construct, equip, and complete said railroad in good running order from the junction of their road with the La Crosse and Milwaukee railroad northward a distance of not less than twenty miles, by the 1st day of July, 1858, and to protect and save harmless the said city against the payment of the interest or principal of the bonds issued to said company, till the said first twenty miles of said railroad shall be completed, fully equipped, and in good running order.

Fourth. The said railroad company shall issue to the city of Milwaukee, as collateral security for the faithful performance of
157 all the conditions of the last foregoing bond, one hundred thousand dollars of full paid stock in said railroad company.

Fifth. The said railroad company shall also, as further collateral security for the performance of the conditions of said last-mentioned bond, assign and deliver to the city of Milwaukee of their first mortgage bonds, on the division of their railroad extending from Milwaukee to the city of Green Bay, the amount of one hundred thousand dollars, which mortgage bonds shall be secured by a lien upon the last aforesaid division of said Milwaukee and Superior, and upon its equipments, rolling stock, real estate, depot grounds, and buildings, personal property and franchise to the full extent provided in section four of the act hereinbefore referred to, except that said mortgage bonds shall be secured by a first mortgage or lien upon said property, and not subject to any other.

(Signed) AUG. GREULICH.
" H. HAERTEL.
" J. TAYLOR.
" J. SHORTELL.
" E. BUTTON.
" J. H. CORDES.

Which was adopted by the following vote:

Ayes: Ald. Button, Bast, Cordes, Dick, Delaney, Greulich, Haertel, Humphrey, Kuehne, Mallory, Milman, Marnell, O'Brien, Shortel and Taylor.

Noes: None.

158 I hereby certify that the foregoing is a true copy of a report as recorded in volume nine, (9) pages 371, 2, 3, 4, and 375 of the records of the city of Milwaukee, under date of February 2nd, A. D. 1857, and now on file in the office of the city clerk.

(Signed) R. B. LYNCH, *City Clerk.*

The foregoing offered and read in evidence on behalf of the defendant, the city of Milwaukee, before me.

(Signed) WINFIELD SMITH, *Master, &c.*

It is also admitted in this cause, as if proved, that the defendant, the city of Milwaukee, has issued its bonds in due form, properly executed, to the amount of one hundred thousand dollars, and has delivered the same to the defendant, the Milwaukee and Superior R. R. Company, and that the semi-annual interest accruing thereon upon the first day of January, 1858, and the semi-annual instalments accruing thereon since that time, have not been paid by the said railroad company, defendant.

It is also admitted that the said bonds of the said city were
159 issued, in the year 1857, in pursuance of the action of the common council of said city, based upon a report of a committee thereof, a copy of which report is hereto annexed.

Dated Friday, 7th October, 1859.

WINFIELD SMITH, *Master, &c.*

SATURDAY, 17*th September*, 1859.

Present: Mr. Palmer, of counsel for the city of Milwaukee, and Mr James B. Cross.

James B. Cross, being duly sworn as a witness in his own behalf, testifies as follows:

In pursuance of the authority conferred in a resolution adopted May 17th, 1859, by the board of directors of the Milwaukee and Superior Railroad Company, a copy of which is attached to the deposition of Mr. Stark, taken before the master in this cause, (and marked M,) a notice was published in the Milwaukee Daily News for six successive days before the day of sale therein mentioned. The notice, with proof of such publication, is now produced by me). The notice and affidavit are hereto attached, marked N.) At the time and place mentioned in this notice, the bonds described in the notices, being the same 322 bonds first produced by my counsel before the master in this cause, were produced and offered for sale at public
160 auction, (N. J. Emmons acting as auctioneer,) and were struck off and sold to me, I being the highest bidder therefor, at the price of seven cents on a dollar, or seventy dol-

lars for each of said bonds, amounting to twenty-two thousand five hundred and forty dollars in the aggregate. Those bonds were thereupon delivered to me, the purchase money having been applied upon the indebtedness for which they were pledged as security. I claim to be now, and since the date of that sale, the 28th day of May, A. D. 1859, the absolute owner of those bonds.

I am also the owner of the 100 bonds last produced before the master in this cause by my counsel, and before that produced and subsequently withdrawn by the counsel of Messrs. Buttrick & Fuller. I purchased those 100 bonds since they were first produced here, in the month of August, 1859, for the sum of three thousand dollars.

J. B. CROSS.

N.

STATE OF WISCONSIN, *Milwaukee County*:

R. L. Edwards, being duly affirmed, says, that he is the
161 clerk of the "Milwaukee News," a newspaper published in the city of Milwaukee, in said county; that a notice, of which the annexed is a true copy, was duly published in such newspaper six days, commencing on the 20th day of May, A. D. 1859, and ending on the 26th day of May, A. D. 1859.

R. L. EDWARDS.

Subscribed and affirmed to, this 16th day of Sept. 1859, before me

AUG. GREULICH,
Notary Public Mil. Co., Wis.

Notice.

Three hundred and twenty-two thousand dollars of the first mortgage bonds of the Milwaukee and Superior Railroad Co. will be sold at auction on Saturday, the 28th day of May instant, at 12½ p. m., at the Chamber of Commerce.

May 20—d. 6 ter.

DISTRICT OF WISCONSIN, *ss:*

I certify that the foregoing depositions were taken before me at the place and times and in presence of the counsel above stated; that the said witnesses were by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause; that their answers, so made on oath, were by me reduced to writing in their presence, and being first carefully read to them, were by them subscribed; that the foregoing papers, marked from A to N
162 inclusive, are the same produced before me and referred to in the said depositions.

Dated this 10th day of October, 1859.

WINFIELD SMITH, *Master, &c.*

And same day, affidavits of publication of notice of examination before master filed as follows:

Affidavit of pub'n of notice.

STATE OF WISCONSIN, *Milwaukee County, ss:*

A. J. Reed, being duly affirmed, says, that he is the foreman of the "Milwaukee Daily News," a newspaper published in the city of Milwaukee, in said county; that a notice, of which the one annexed is a true copy, was duly published in such newspaper three seccessive weeks, commencing on the 21st day of April, A. D. 1859, and ending on the 12 day of May, A. D.

A. J. REED.

Subscribed and affirmed to, this 1st day of August, A. D. 1859, before me.

P. V. DEUSTER,
Notary Public Mil. Co., Wis.

District Court of the United States for the district of Wisconsin.

Notice annexed.

THE FARMERS' LOAN AND TRUST COMPANY *vs.* THE MILWAUKEE & SUPERIOR RAILROAD COMpany, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian
163 Hahm and Gottfried Wootsch. } In equity.

It having been referred to a master of this court, by a decretal order of reference made in this cause on the nineteenth day of March, A. D. 1859, to take an account of the outstanding bonds of the Milwaukee and Superior Railroad Company, defendant, secured by a certain trust deed on mortgage executed by the said railroad company, defendant, to the Farmers' Loan and Trust Company, in trust, bearing date first day of January, A. D. 1857, and which are a lien upon the mortgaged premises described in the said mortgage; and of the number and holders of said bonds; of the amount due thereon for interest and principal; of the number and amount of said bonds which are pledged or held as collateral security for debts or obligations of the said railroad company, and the amount of principal and interest due upon the debts or obligations for which such bonds are so pledged or held as security; and also to examine any of the holders of such bonds, any of the parties to this suit, and any witness that may be produced by any party interested in said company, defendant, as a stockholder or creditor thereof, or in the said mortgage or trust deed.

And it being further provided in and by the said order that all persons holding or claiming to hold any of the said mortgage
164 bonds, either as purchasers thereof in good faith, or as colla-

teral security, have leave to appear before said master, and be heard upon the matter of such account and examination;

And the matters embraced in the said order of reference having been given in charge by the complainant's solicitors to the undersigned, one of the masters of this court:

Notice is therefore hereby given to all persons concerned that I, the undersigned, shall proceed to take such examination and account, and to proceed in the matters so referred at my office, in the city of Milwaukee, in the State of Wisconsin, on the sixth day of June, A. D. 1859, at 11 o'clock in the forenoon, and upon other subsequent days to which such proceedings may from time to time be adjourned, at which time and place all parties concerned, or some one for them, are to attend.

Dated Milwaukee, this 28th day of March, 1859.

WINFIELD SMITH,
Master in Chancery.

Apr. 21—d. 3 w.

Affidavit of pub'n of notice in N. Y. Com'l Adv'r.

CITY AND COUNTY OF NEW YORK, *ss:*

Henry J. Boulware, of the city of New York, being duly sworn, says, that he is a foreman in the office of the New York Commercial Advertiser, a daily paper printed and published in the city 165 of New York; and that the notice, of which the annexed is a printed copy, has been regularly published in the said New York Commercial Advertiser, for three weeks successively, commencing on the 30th day of April, 1859.

HENRY J. BOULWARE.

Sworn before me this 24th day of May, 1859.

R. E. STILLWELL,
U. States Commissioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the Circuit Court of the United States of America for the southern district of New York, second circuit, do hereby certify, that I am well acquainted with the handwriting of R. E. Stillwell, whose name is subscribed to the annexed jurat, and that the signature to the same is in his proper handwriting. And I do further certify, that he was at the time of signing the same a United States commissioner, duly appointed by the Circuit Court of the United States of America for the southern district of New York, second circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Circuit Court, this twenty-fourth day of May, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of these United States the eighty-third.

[SEAL.] KENNETH G. WHITE, *Clerk.*

166 District Court of the United States for the district of Wisconsin.

Notice annexed to affidavit.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm and Gottfried Wootsch. } In equity.

It having been referred to a master of this court, by a decretal order of reference made in this cause on the nineteenth day of March, A. D. 1859, to take an account of the outstanding bonds of the Milwaukee and Superior Railroad Company, defendant, secured by a certain trust deed on mortgage executed by the said railroad company, defendant, to the Farmers' Loan and Trust Company, in trust, bearing date first day of January, A. D. 1857, and which are a lien upon the mortgaged premises described in the said mortgage; and of the number and holders of said bonds; of the amount due thereon for interest and principal; of the number and amount of said bonds which are pledged or held as collateral security for debts or obligations of the said railroad company, and the amount of principal and interest due upon the debts or obligations for which such bonds are so pledged or held as security; and also to examine any of the holders of such bonds, any of the parties to this suit, and any witness that may be produced by any party interested in said company, defendant, as a stockholder or creditor thereof, or in the said mortgage or trust deed.

167 And it being further provided in and by the said order, that all persons holding or claiming to hold any of the said mortgage bonds, either as purchasers thereof in good faith, or as collateral security, have leave to appear before said master, and be heard upon the matter of such account and examination;

And the matters embraced in the said order of reference having been given in charge by the complainant's solicitors to the undersigned, one of the masters of this court:

Notice is therefore hereby given to all persons concerned, that I, the undersigned, shall proceed to take such examination and account, and to proceed in the matters so referred at my office, in the city of Milwaukee, in the State of Wisconsin, on the sixth day of June, A. D. 1859, at 11 o'clock in the forenoon, and upon other subsequent days to which such proceedings may from time to time be adjourned, at which time and place all parties concerned, or some one for them, are to attend.

Dated Milwaukee, this 28th day of March, 1859.

WINFIELD SMITH,
Master in Chancery.

Ap. 30—3 w.

Filed October 10, 1859.

NOVEMBER 21, 1859.

168 This day came James B. Cross, and presented his petition, setting forth that he is the purchaser of the premises described in the decree of sale in this case, from M. J. Thomas, marshal, and that said Thomas has since died before making a deed, and praying the court for an order that the present marshal make a deed, which petition is as follows:

Petition of Jas. B. Cross.

To the Honorable Andrew G. Miller, judge of the District Court of the United States for the district of Wisconsin:

The petition of James B. Cross respectfully represents that your petitioner purchased of Major J. Thomas, esqr., late marshal of the said district of Wisconsin, the following described property, to wit: "All the following, present and in future, to be acquired real and personal property and estate of the said defendant, the Milwaukee and Superior Railroad Company, that is to say, all of the first division of the railroad of said railroad company, defendant, from the city of Milwaukee to the city of Green Bay, in said State of Wisconsin, a distance of one hundred and twenty miles, including the right of way and land occupied by said first division of said road, (subject to the right, title, or claim which the said defendants, Stewart, Allerding, Hahm, and Wootsch, or either of them, may have had at the time of making said decree, to land upon which said railroad com-
169 pany has located its way, and for which no compensation has been made to them,) together with the superstructure and track thereon, and all rails and other materials used thereon, bridges, viaducts, culverts, fences, equipments, necessary depot grounds, and buildings thereon belonging to the said railroad company, and all rolling stock, engines, tenders, cars, tools, materials, machinery, fixtures, and all other personal property appertaining to said first division of said road, and all rights thereto and interest to be acquired by said defendant, the Milwaukee and Superior Railroad Company, together with the name and functions appertaining to the said first division of said road, all tolls, rents, and income to be had or levied therefrom, and all corporate and other franchises, rights and privileges of the said railroad company in and to or concerning the same."

Which premises were sold by said marshal in pursuance of a decree of this court in equity for the sum of twenty thousand one hundred dollars, and have fully paid the above sum, being the consideration money therefor; that the said decree was made at the suit of the Farmers' Loan and Trust Company against the Milwaukee and Superior Railroad Company, City of Milwaukee, John Stuart, Johann C. A. Allerding, Christian Hahm and Gottfried Wootsch.

170 That the said marshal died on or about the first day of November last past, before any deed was executed by him for said premises to the petitioner.

Your petitioner therefore prays the court to order and direct John H. Lewis, esq., the present marshal, to perfect the title of your petitioner to the said premises by executing a deed to him for the same, agreeably to the act of Congress in such case made and provided.

And your petitioner will ever pray, &c.

J. B. CROSS.

EMMONS, VAN DYKE & HAMILTON,
For Petitioner.

DISTRICT OF WISCONSIN, *ss:*

On this twenty-first day of November, A. D. 1859, personally appeared before me James B. Cross, who being sworn says, that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true.

J. M. MILLER, *Clerk, &c.*

Order that present marshal execute deed.

On consideration whereof it is ordered by the court that J. H. Lewis, the present marshal, perfect the title of said premises in said purchaser, James B. Cross, by making him a deed according to law.

Order to deposit proceeds of sale.

NOVEMBER 22, 1859.

This day came William H. Thomas, the deputy of M. J. Thomas, late marshal, who made the sale of the mortgaged
171 premises, and paid into court twenty thousand one hundred dollars, the amount of the proceeds of the sale of the said premises; and by consent of the parties in interest in said money, and at their request, it is ordered by the court that the said money be deposited by the clerk in the name of the court in the Juneau Bank in this city until the further order of the court.

Order for writ of assistance.

NOVEMBER 28, 1859.

This day came the complainant and James B. Cross, the purchaser of the mortgaged premises, by their counsel, Messrs. Emmons, Van Dyke, and Hamilton, and on their motion and affidavit filed it is ordered by the court that a writ of assistance be and hereby is allowed.

Writ of assistance issued.

DECEMBER 15, 1859.

This day came James B. Cross, a bondholder, by Messrs. Butler, Buttrick and Cottrill, his solicitors, and filed exceptions to the report of Winfield Smith, esq., master, as follows:

United States Dist. Court, district of Wisconsin.

Exceptions to report of master.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE MILWAUKEE and SUPERIOR RAILROAD Company and others.

And now comes the said James B. Cross, a bondholder, un-
172 der the mortgage or trust deed mentioned in the decree in this suit, by Butler, Buttrick and Cottrill, his solicitors, and excepts to the report of Winfield Smith, esqr., master of this court, made under the order of reference contained in the decree in this action and filed with the clerk of this court on the day of , 1859, and specifies the following exceptions, to wit:

First. To so much of said report as determines that at the date of the decree herein 128 of said bonds were outstanding and held by the city of Milwaukee, and were a lien upon the said mortgaged premises to the amount of the principal and interest appearing to be due upon the face thereof.

Second. To so much of said report as determines that the bonds numbered one hundred and forty-one to two hundred and inclusive have never been issued by authority of the railroad company, defendant, nor held by bona-fide holders for a valuable consideration, and are therefore void.

Third. To such part of said report as determines that at the date of said decretal order herein there was due to the city of Milwaukee, upon one hundred and twenty-eight bonds in her possession, the sum of $154,204 44, and to James B. Cross, on the bonds held by him, the sum of $49,573 33, only.

173 Fourth. That said master has neglected to report that there was due to the said James B. Cross the amount of the principal and interest upon said two hundred and eighty bonds numbered 271 to 550 inclusive, and that said bonds were outstanding and a lien upon said mortgaged premises under said decretal order.

Fifth. That said report, in the particulars specified above, is against all the evidence before the master, and is unwarranted by the facts reported by him as proved in the case.

BUTLER, BUTTRICK & COTTRILL,
Sol'rs for James B. Cross.

Hearing of exceptions.

JANUARY 9, 1860.

This day the exceptions to the report of the master came on to be heard and was argued by counsel, and the court took the same under consideration.

And afterwards, to wit, at a stated term of said court, begun and held according to law at the city of Milwaukee, on the first Monday (being the second day) of January, A. D. 1860. Present, the Honorable Andrew G. Miller, judge of said court, presiding. And on the thirteenth day thereof, to wit, on the eighteenth day of January, A. D. 1860, the following proceedings were had, to wit:

174 *Order of distribution.*

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE MILWAUKEE AND SUPERIOR RAILROAD Company, City of Milwaukee, John Stewart, Johann C. A. Allerding, Christian Hahm, and Gottfried Wootsch. } In equity.

This day came the parties in interest by their counsel, and the court being sufficiently advised of and concerning the exceptions to the report of the master and of the arguments of counsel, it is thereupon ordered by the court that the first exception to said report be and hereby is allowed; that the second exception to said report be and hereby is overruled; that the third and fourth exceptions to said report be and hereby are allowed. And it is further ordered by the court that twenty thousand one hundred dollars paid into court, as the proceeds of sale of the mortgaged premises, be paid out in manner following, that is to say, that there be first paid the costs, expenses and disbursements of the decree and sale, and of the distribution of these proceeds of sale, amounting as taxed, to seven hundred and fifty-five dollars and twenty-three cents; that there be paid to the complainant or its solicitors, for fees and services of the trust, seven hundred and fifty-one dollars. And that the residue of
175 eighteen thousand five hundred and ninety-three dollars and seventy-seven cents be paid the complainant or its solicitors in trust for the holders of the bonds of the railroad company that were pledged by J. Boorman, Johnston & Co., as security for a debt of said company to them. And it is further ordered by the court that the receipt of the solicitors of complainants be taken for the same, and for such other sums as are ordered to be paid to them or for their disbursements.

176 UNITED STATES OF AMERICA, *District of Wisconsin, ss*:

I, Edward Kurtz, clerk of the Circuit Court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are

true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of The Farmers' Loan and Trust Co. *vs.* The Milwaukee and Superior R. R. Co. *et als.*

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district of Wisconsin, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the said United States the ninety-third.

EDWARD KURTZ, *Clerk.*

177 Supreme Court of the United States, Dec. term, 1868.

Appeal in equity from Circuit Court of U. S. Disct. of Wis.

G. P. DRURY *et al.*
vs.
J. B. CROSS *et al.* } No. 2.

A certiorari having been issued in this cause to the clerk of the Circuit Court of the United States for the district of Wisconsin, returnable to a former term of this court, which has not been answered and returned by said clerk:

It is hereby stipulated that said clerk may now make return and answer to said writ, and no objection shall be taken that said return was not made to this court on or before the return day of said writ; and that said clerk shall make as return thereto, and as a part of the record in this case, a copy of the record in the case of the Boston Locomotive Works *vs.* The Milwaukee and Superior Railroad Company, in the U. S. District Court of Wisconsin, being a part of the testi-
178 mony of the complainants; and also copies of the record in the case of The Farmers' Loan and Trust Company, trustees, *vs.* The Milwaukee and Superior Railroad Company, and others, in equity, in said District Court of Wisconsin, and a copy of the record in the case of The Boston Locomotive Works against The Milwaukee and Superior Railroad Company, in the Circuit Court of Milwaukee county, being a part of the testimony of the defendant.

Dated November 11, 1868.

MATT. H. CARPENTER,
Of Counsel for Compl't and Appellant.
H. L. PALMER,
Of Counsel for Respondent.

Endorsed: U. S. Circuit Court, Wisconsin. G. P. Drury *et al.* *v.* James B. Cross *et al.* Stipulation. Filed November 11, 1868.

179 THE UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the Circuit Court of the United States for the district of Wisconsin, greeting:

Whereas, in a certain suit in said Circuit Court, between G. P. Drury and William Page, assignees of the Boston Locomotive Works, complainants, and the Milwaukee and Superior Railroad Company, James B. Cross, James Ludington and Samuel B. Scott, defendants, which suit was removed to the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That the record returned to this court on the appeal in this cause is defective in this, that the same does not contain a copy of the record of the judgment at law, mentioned in the bill of complaint in this cause, and to enforce which this suit was commenced, which was read in evidence on the hearing of this cause in the court below, and that the said record is defective in this, that it omits divers

180 other of the testimony and written proofs which were read in evidence in said cause on the hearing thereof in the court below."

You, therefore, are hereby commanded that, searching the records and proceedings in said cause, you certify what omissions and errors you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court, the first Monday of December, A. D. 1866.

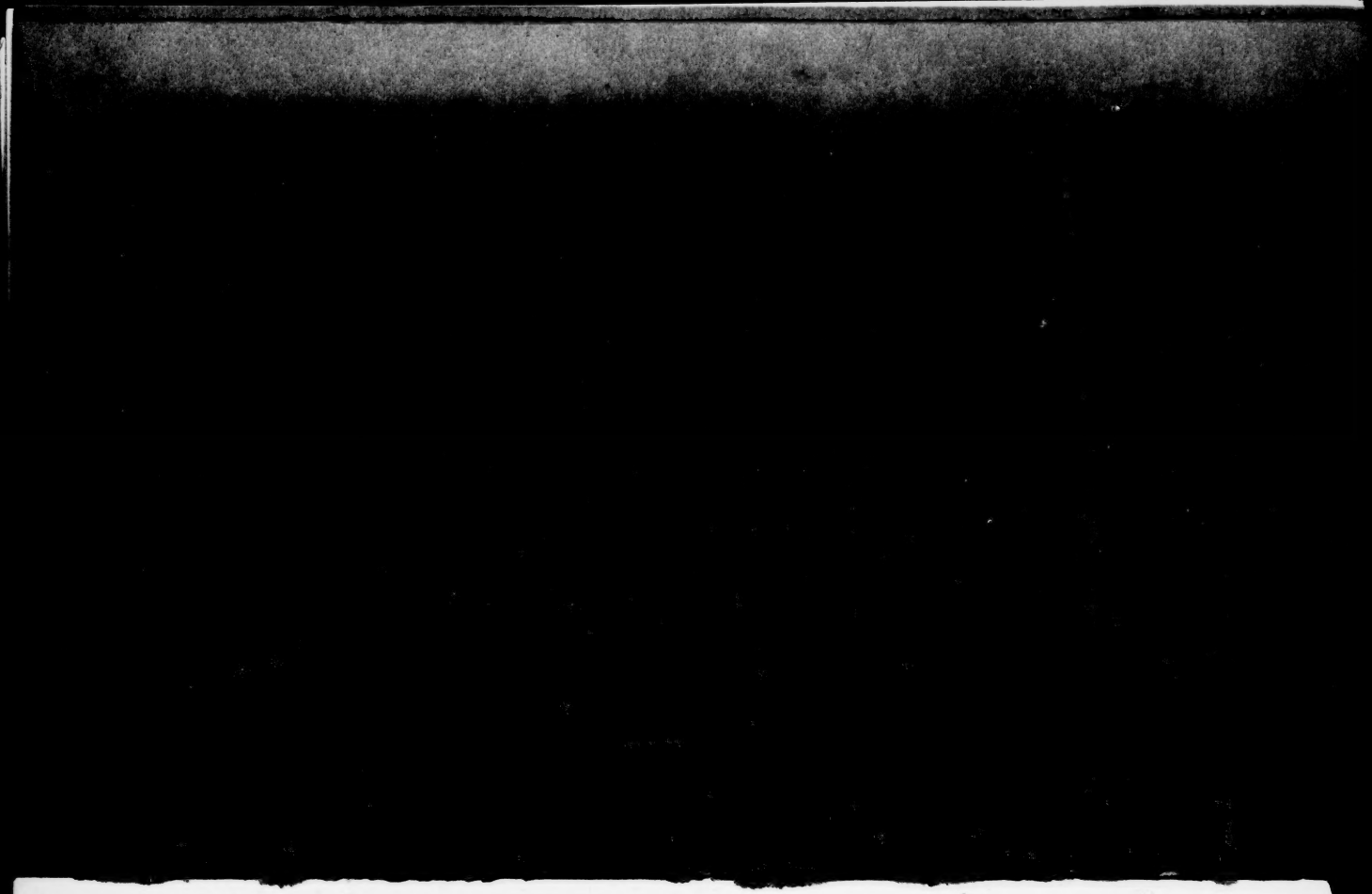
[SEAL.]

D. W. MIDDLETON,
Clerk Supreme Court of the United States.

To the honorable the judges of the Supreme Court of the United States:

By direction of the judges of the Circuit Court, and pursuant to the annexed stipulation, I do humbly certify and send the record and written proofs within mentioned, so full and entire as before this court they remain, in certain schedules to this writ annexed.

EDWARD KURTZ,
Clerk U. S. Circuit Court, Dist. of Wis.

Endorsed: No. 75. December term, 1866. Writ of certiorari. Supreme Court United States. G. P. Drury et al. *vs.* Mil. &. Sup'r R. R. Co. Filed March 11, 1867.

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